NO. 77-453

IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

EASTEX, INCORPORATED
Petitioner

v.

NATIONAL LABOR RELATIONS BOARD,
Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit entered in the above captioned case on April 29, 1977.

OPINIONS BELOW

The decision of the Administrative Law Judge of the National Labor Relations Board is reported at 215 NLRB 271 and appears in the Appendix at pages 4a-23a. The decision and order of the National Labor Relations Board is reported at 215 NLRB 271 and appears in the

Appendix at pages 24a-25a. The opinion of the Fifth Circuit Court of Appeals is reported at 550 F.2d 198, and appears in the Appendix at pages 26a-42a. The judgment of the Court of Appeals appears in the Appendix at page 43a. The decision of the Fifth Circuit denying Petitioner's motion for rehearing and motion for rehearing *en banc* appears in the Appendix at pages 44a-47a.

JURISDICTION

The judgment of the Court of Appeals was entered on April 29, 1977 (Appendix p. 43a). A timely petition for rehearing was denied on August 5, 1977 (Appendix p. 47a). Mandate was stayed to and including September 23, 1977. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1) and Section 10(f) of the National Labor Relations Act, 29 U.S.C. §160(f).

QUESTIONS PRESENTED

1. Whether the "mutual aid or protection" language of Section 7 of the National Labor Relations Act grants protection to distribution, by employees on their employer's property, of writings or other materials containing subject matter which is political in nature or is not closely related to the employees' immediate employment relationship?

2. Whether Section 7 grants protection to the distribution by employees on an employer's premises of any material having a subject matter "reasonably related" to the employees' jobs, status, or condition as employees?

3. Whether the interference with an employer's property rights which results from application of the "reasonable relation" standard used by the court below is completely out of proportion to the nature and strength of the Section 7 rights to be protected?

4. Whether the initial "balancing and accommodation" of employees' Section 7 rights and employer private property rights should have been made by the National Labor Relations Board rather than by the Court of Appeals?

5. Whether the "accommodation" and "balance" made by the Court of Appeals in applying its "reasonable relation" standard reflects an appropriate recognition of an employer's property rights?

STATUTES INVOLVED

Section 7 of the National Labor Relations Act, 29 U.S.C. §157, reads in pertinent part as follows:

> "Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection . . ."

Section 8(a)(1) of the National Labor Relations Act, 29 U.S.C. § 158(a)(1) reads as follows:

> "It shall be an unfair labor practice for an employer—
>
> "(1) to interfere with, restrain, or coerce employees in the exercise of rights guaranteed in § 157 of this title."

STATEMENT OF THE CASE

This is an action to review a final order of the National Labor Relations Board ("Board") wherein the Board determined that Eastex, Incorporated ("Petitioner") violated Section 8(a)(1) of the National Labor Relations Act, 29 U.S.C. §158(a)(1), ("Act") by prohibiting distribution of a union-sponsored circular by employees on Petitioner's premises.

This case arose out of a decision by the Personnel Director of Petitioner denying permission to employee members of the United Paperworkers International Union, Local 801 ("Union") to distribute a union circular on Petitioner's plant premises because Sections 2 and 3 of the circular were considered to have no relevance to any matter concerning Petitioner's relations with its employees, and were political in nature. Petitioner had no objection to the distribution on plant premises of Sections 1 and 4 of the circular. (The complete contents of the circular appear in the Appendix at pages 1a-3a.) Section 2 of the circular, "A Phony Label—right to work", consisted of an argument against inclusion by a Texas constitutional convention of a "right to work" provision in a proposed revised constitution.[1] Section 3 of the circular, "Politics and Inflation", contained criticism of then President Nixon for his veto of H.R. 7935, a minimum wage bill, and comments about oil industry profits.

As a result of Petitioner's refusal to allow distribution of Sections 2 and 3, Union filed an unfair labor practice charge with the Board on May 2, 1974, alleging violation of the Act. An amended charge was filed on June 4,

1. Texas has been a "right to work" state continuously since 1947. See Tex. Rev. Civ. Stat. Ann. Art. 5154g, § 1.

1974. The Board issued a complaint on June 4, 1974, alleging violations of Section 8(a)(1) of the Act through Petitioner's refusal to allow distribution of the circular and its retention of no-solicitation and no-posting rules.

An Administrative Law Judge held that prohibiting distribution of the entire circular on plant premises was a violation of Section 8(a)(1) of the Act.[2] (Appendix pp. 4a-23a) On December 4, 1974 a three-member panel of the Board rendered a decision and order affirming the rulings, findings and conclusions of the Administrative Judge, and adopted his recommended order. (Appendix pp. 24a-25a)

On Appeal under Section 10(f) of the Act, the court below affirmed.[3] The court held that the "mutual aid or protection" clause of Section 7 extends to cover distribution on plant premises of "whatever is reasonably related to the employees' *jobs* or to their status or condition as employees in the plant", and included Sections 2 and 3 of the Union circular within the compass of such protection. The court rejected Circuit authority from the Fourth, Sixth, Seventh and Ninth Circuits which more narrowly limits the scope of Section 7 protection. On petition for rehearing and petition for rehearing *en banc*, the court below deleted all references to the First Amendment which were contained in its original opinion. Rehearing was denied.

2. The Administrative Law Judge also found that Petitioner maintained a no-solicitation rule in violation of § 8(a)(1) of the Act. Petitioner does not challenge the Administrative Law Judge's order as to the rule, nor did this rule play any role in Petitioner's decision to prohibit distribution of the union circular. The rule is not in issue here. A no-posting rule was upheld. If distribution of the circular was not protected, the presence or absence of a no-solicitation rule would have no effect.

3. Reported at 550 F.2d 198 (5th Cir. 1977). (Appendix pp. 26a-42a).

REASONS FOR GRANTING THE WRIT

I.

The decision of the court below is in conflict with decisions of four other Circuit Courts of Appeal—the Fourth, Sixth, Seventh, and Ninth.[4] This conflict was conceded by the Fifth Circuit in its opinion, which also invited resolution of the conflict by this Court. 550 F.2d 198, 202 (Appendix p. 34a). There is authority in the First, Second and Ninth Circuit Courts of Appeal which lends some nominal support to the Fifth Circuit's rationale.[5] The conflict among (and within) the Circuits revolves around the scope of the activity protected by the "other mutual aid or protection" language of Section 7 of the Act. The majority of Circuit Courts have taken the same position as Petitioner: activity is protected as "other mutual aid or protection" only if it concerns matters which are intimately connected to the employees' immediate employment or over which the employer has control, or requests action on the part of the employer.[6]

---

4. See note 6, infra. Although the court below relied upon *Kaiser Engineers v. NLRB*, 538 F.2d 1379 (9th Cir. 1976), *Kaiser* is itself in conflict with two other Ninth Circuit decisions: *Shelly & Anderson Furniture Mfg. Co. v. NLRB*, 497 F.2d 1200 (9th Cir. 1974), and *Tanner Motor Livery, Ltd. v. NLRB*, 419 F.2d 216 (9th Cir. 1969). *Kaiser* was a 2-1 decision authored by District Court Judge Sweigert which did not overrule such other decisions, and did not involve employer property rights. Consequently, Petitioner asserts that *Kaiser* does not dislodge *Shelly & Anderson* and *Tanner Livery* as representative of the mainstream of Ninth Circuit authority. See 538 F.2d 1379, 1386-87 (Dissent of Kennedy, J.).

5. See *NLRB v. Peter Cailler Kohler Swiss Chocolate Co.*, 130 F.2d 503 (2nd Cir. 1942); *Bethlehem Shipbuilding Corp. v. NLRB*, 114 F.2d 930 (1st Cir. 1940); *cert. denied*, 312 U.S. 710 (1941); *Kaiser Engineers v. NLRB, supra.*

6. See *NLRB v. Leslie Metal Arts Co., Inc.*, 509 F.2d 811, 813 (6th Cir. 1975), ("Protected activity must in some fashion involve employees' relations with their employer. * * *"); *Shelly & Anderson Furniture Mfg. Co. v. NLRB*, 497 F.2d 1200 (9th Cir. 1974), (Protected activity must seek a specific remedy for a work-related complaint or grievance); *NLRB v. Tanner Motor Livery Ltd.*, 419 F.2d 216 (9th Cir. 1969), (the mutual aid clause of Section 7 "protects concerted activities which have to do with terms and conditions of employment"); *G & W Electric Speciality Co. v. NLRB*, 360 F.2d 873 (7th Cir. 1966), (when the activity of the employee does not involve a request for any action on the part of the company or does not concern a matter over which the company has any control such action is not within the other mutual aid or protection of 29 U.S.C.A. § 157); *NLRB v. Bretz Fuel Co.*, 210 F.2d 392, 396 (4th Cir. 1954), ("Concerted activity is protected only where such activity is intimately connected with the employees' immediate employment").

The position of the Fifth Circuit echoes that taken by the majority in *Kaiser Engineers, supra,* in the *Ninth* Circuit.[7] The Fifth Circuit held that any matter "reasonably related to the employees' *jobs* or to their status or condition as employees in the plant may be the subject" of handouts distributed on the plant premises. 550 F.2d 198, 202 (Appendix p. 36a). This standard and the interpretation of it by the court directly conflicts with *Shelly & Anderson* (Ninth), *G & W Electric* (Seventh), *Leslie Metal Arts* (Sixth) and *Bretz Fuel* (Fourth).[8]

The conflict is clear through comparison with *Bretz Fuel.* In *Bretz Fuel* the miner-employees demonstrated in opposition to a "Fire Boss" bill in the legislature. Although the passage of the legislation would have had an effect in the mines, the court held that the protest was unprotected activity because the subject matter was not "intimately connected with the employees' immediate employment". 210 F.2d at 396. In the instant case, the union sought to distribute polemics regarding a Presidential veto of a

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7. See note 4, *supra.*

8. See note 6, *supra.*

minimum-wage bill, oil industry profits, and a proposed constitutional provision before the Texas constitutional convention incorporating Texas' existing "right-to-work" statute. Neither matter was intimately connected with immediate employment as the court below recognized.[9]

The Ninth Circuit in *Shelly & Anderson Furniture Mfg. Co. v. NLRB*, 497 F.2d 1200 (9th Cir. 1974) declared that an activity must satisfy four elements to qualify for Section 7 protection:

> "1) there must be a work-related complaint or grievance;
> 2) the concerted activity must further some group interest;
> 3) a specific remedy or result must be sought through such activity;
> 4) the activity should not be unlawful or otherwise improper." 497 F.2d at 1202-3.

The material in the instant case wholly fails to satisfy the first or third elements of *Shelly & Anderson Furniture Mfg. Co.*

The Seventh Circuit in *G & W Electric Specialty Co. v. NLRB*, 360 F.2d 873 (7th Cir. 1966) *expressly rejected* the "reasonable relation" or connection test employed by the Fifth Circuit.

> "The Board's decision expresses the view that the ambit of §7 . . . extends to the type of indirectly-related activity . . . (which) . . . bears such a *reasonable* connection to matters affecting

9. Petitioner also asserts that the material was not even "reasonably related" to the employees' jobs or status as Petitioner's employees. See discussion, *infra*.

> the interests of employees *qua* employees as to come within the general reach of the 'mutual aid and protection' the statute is concerned to protect.
>
> " . . . Here the activity involved no request for any action upon the part of the Company and did not concern a matter over which the Company had control. . . . It was not an interest derived from their status as company employees or bearing any significant connection to their employment relationship with the Company.
>
> "The sweep of the broad interpretation inherent in the Board's application of the 'or other mutual aid or protection' clause to the facts of the instant case gives to that clause a meaning and effect which in our opinion is out of harmony with the immediate context in which the clause appears and which transcends the subject matter the Act is designed to embrace—labor-management relations.
>
> "The range of possible employee mutual interests apart from those which bear a reasonably significant impact upon working conditions or some material incident of the employment relationship is in our opinion a much broader field than Section 7 is designed to encompass."[10] 360 F.2d at 876-77.

II.

The "reasonable relation" standard adopted by the Fifth Circuit is also out of harmony with the decisions of this Court. In three decisions this Court has been uniform in its emphasis upon minimal interference with the property rights of employers. *Hudgens v. NLRB*, 424

10. In the present case the Administrative Law Judge and, by adoption, the Board relied upon and quoted the Board's decision in *G & W Electric Speciality Co.*, 154 NLRB 1136 (Appendix p. 16a). The Seventh Circuit in that case refused to enforce the Board's interpretation of Section 7. 360 F.2d at 876-77.

U.S. 507 (1976); *Central Hardware Co. v. NLRB*, 407 U.S. 539 (1972); *NLRB v. Babcock & Wilcox*, 351 U.S. 105 (1956). *Hudgens* instructs that the "guiding principle" (*Central Hardware, supra*, at 544) established by this Court under the Act is the "accommodation of Section 7 rights and private property rights "with as little destruction of one as is consistent with the maintenance of the other." 424 U.S. at 522. The Fifth Circuit's standard that Section 7 protects anything "reasonably related to the employees' jobs or to their status as employees" will result in the protected distribution of material on a range of subjects wholly remote from wages, hours and terms and conditions of employment. Consequently, the interference with the employer's property rights will be completely out of proportion to the nature and strength of the Section 7 rights to be protected.

The principle of *Babcock* and *Central Hardware* requires a "yielding" of property rights which is *"temporary and minimal"* only after a balancing and accommodation has been made. 407 U.S. at 544. While both *Babcock* and *Central Hardware* involved organizational campaigns, this Court in *Hudgens* held that other union activities (there strike picketing) must also be accommodated to employer property rights in a manner that involves "minimal interference".

The court below has interpreted Section 7 so broadly that any topic in union literature can easily be rationalized into a finding of "reasonable relation" to union or employee interests. Once this "reasonable relation" is found, the literature may be distributed on an employer's property although its relation to the employer is at best attenuated and, in fact, logically remote. The topics which could be addressed under the "reasonable relation" stand-

ard are almost unlimited. Controversies in the political sphere over such issues as common-situs picketing, the Equal Rights Amendment, welfare reform, illegal aliens or amendment of the National Labor Relations Act could all be addressed by union in-plant handouts under the holding of the Fifth Circuit. Since those seeking public or union elective office may well pursue actions which have a "reasonable relation" to the employees' "status or condition", the ruling of the Fifth Circuit would seem to allow union distribution on an employer's property of literature endorsing such candidates. Apart from the inherent danger of disruption and dissension arising from the distribution of handouts addressing controversial topics, especially political ones, the ruling below allowing broad latitude to union or employee distributions goes far afield from the *minimal* interference with private property rights mandated by this Court in *Babcock, Central Hardware* and *Hudgens*.[11]

III.

The issues presented are of universal importance in administration of the National Labor Relations Act. They go to the heart of the basic governing provision of the Act, Section 7. The content of materials which may be distributed by a labor organization within an employer's premises is a question which immediately and directly

11. The standard adopted by the Fifth Circuit in the instant case and the practical effects of the standard establish and extend basically First Amendment parameters to Section 7. Such a view of Section 7 was disapproved by this Court in *Hudgens, supra*. The original decision of the Fifth Circuit reflected this disposition. On Eastex' motion for rehearing, the court below excised all reference to the First Amendment, but did not change the rationale of its original decision. (Appendix, p. 47a).

affects every employer in the country who has or may have a bargaining relationship with a labor organization.

The standard set by the Fifth Circuit, which protects in-plant distribution of material on any subject matter having a "reasonable relation" to employees' jobs or status as employees, has a serious effect upon employer-employee relations. The standard is in actual practice almost meaningless. It is difficult to conceive of a subject which could not be "reasonably related" in light of the Fifth Circuit's application of such "standard" in this case. The Fifth Circuit has, in effect, made a *de facto* application of First Amendment principles to Section 7 while prohibited from doing so *de jure* by *Hudgens*.[12] The result is an overly expansive reading of Section 7, compounded by subjugation of an employer's property rights in favor of the employees' Section 7 rights contrary to the mandate of this Court.

It is plainly in the public interest to reach a definitive decision[13] on this issue which has resulted in conflict among the Circuits and obfuscates and threatens to obliterate private property rights of employers under Section 7.

IV.

The decision of the court below is also erroneous in its failure to recognize and require an *administrative* balancing of employee Section 7 rights and employer private property rights. As noted in the denial of rehearing,

12. See the opinion of the court below. 550 F.2d 198, 204, n. 11 (Appendix p. 38a, n. 11).

13. The Fifth Circuit recognized the need for Supreme Court resolution of this issue. 550 F.2d at 202 (Appendix p. 34a).

"Eastex claims no balancing process was invoked in any of the administrative or judicial decisions in the case".[14] In answering this charge, the Fifth Circuit asserted that "While *we* did not specifically cite *Hudgens*, *we* did recognize and necessarily applied the balancing tests". (Emphasis added) The Fifth Circuit made no attempt to address the omission of the administrative agency, and impliedly admitted the failure of the Board to balance.[15]

It is clear that the duty to balance and accommodate employees' Section 7 rights with the employer's property rights rests with the Board, not the courts. This Court in *Hudgens* recently reiterated this requirement. ". . . In each generic situation, the primary responsibility for making this accommodation must rest with the Board in the first instance." 424 U.S. at 522. See also *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 169 (1962); *NLRB v. Metropolitan Life Ins. Co.*, 380 U.S. 438, 442-443 (1965); *Securities and Exchange Commission v. Chenery Corp. (I)*, 318 U.S. 80, 90 (1943).

The Administrative Law Judge did not focus upon or make any reference to the Petitioner's property rights. He found only that the two disputed sections of the distributed material were protected by Section 7 and totally ignored Petitioner's property rights. The Board adopted

14. Appendix p. 45a. Petitioner still asserts that the Fifth Circuit failed to conduct a meaningful balancing process.

15. Id. Neither the Board nor the Fifth Circuit considered alternative means of communication available to the union to distribute its polemics. *NLRB v. United Steelworkers*, 357 U.S. 357, 363-64 (1958). It is undisputed that Eastex has always made a mailing list of all employees available to the union, and that the union had previously used the mails for distribution of its political statements. The reason given by the union for its abandonment of mail distribution was the cost.

the ALJ opinion in its entirety, adding nothing. At the least, the ALJ and the Board have failed to "articulate any rational connection between the facts found and the choice made." *FTC v. Sperry & Hutchinson Co.*, 405 U.S. 233, 249 (1972). *Burlington Truck Lines, supra* at 168. *Metropolitan Life Ins. Co., supra* at 443.

Since no balancing process is evidenced in the adminstrative opinion, the Court of Appeals should have remanded the case to the Board for further consideration of the issue of accommodation. *FTC v. Sperry & Hutchinson Co.; Phelps Dodge Corp. v. NLRB*, 313 U.S. 177, 197 (1940). Instead, the court below asserted that it engaged in the original balancing process, superseding the function of the Board.[16]

The initial accommodation is the function of the Board. The duty of the Circuit Court is to *review* the determination of the Board, not to chart paths as yet untraveled by the Board. *Burlington Truck Lines, supra.*[17] "The responsibility to adapt the Act to changing patterns of industrial life is entrusted to the Board." *NLRB v. J. Weingarten, Inc.*, 420 U.S. 251, 266 (1975). Here, the Court of Appeals has left the "narrow confines of law" and has entered the "more spacious domain of policy" reserved for the Board. *Phelps Dodge Corp. v. NLRB*, 313 U.S. 177, 194 (1940). See also, *South Prairie Construction Co. v. Local 627, Operating Engineers*, 425 U.S. 800 (1976); *NLRB v. Food Store Employees*, 417 U.S. 1, 9 (1974).

16. Decision on motion for rehearing (Appendix p. 46a).

17. "For the courts to substitute their or counsel's discretion for that of the Commission is incompatible with the orderly functioning of the process of judicial review." *Burlington*, 371 U.S. at 169. See also *Securities and Exchange Commission v. Chenery Corp. (II)*, 332 U.S. 194, 196 (1947).

Further, not only has the court below overstepped the bounds of judicial review, but while doing so it has balanced the respective rights of employer and employees erroneously. The holding of the Fifth Circuit that the subject matter of any distributed materials having a "reasonable relation" to the employees or their status or condition is protected is error. If the subject matter does not involve a request for any action on the part of the employer, or does not concern a matter over which the employer has any control, the accommodation process requires the conclusion that distribution on the employer's property is *unprotected*, and outside the parameters of "other mutual aid or protection" of Section 7.

In striking a balance, the Board and *reviewing* Court must weigh the nature and strength of the Section 7 rights involved, if any, and accommodate them with the employer's property rights. *Hudgens, supra.* In this situation, where the subject matter of the distribution involved matters in the economic and political sphere, at best tenuously connected to the employees' jobs or relations with the employer, the balance must be struck in favor, of the employer's rights. To do otherwise renders that balancing and accommodation process an empty gesture. The "balancing" done by the court below does not reflect the "accommodation of Section 7 rights and private property rights with as little destruction of one as is consistent with the maintenance of the other" this Court mandated in *Hudgens, supra,* at 522.

Finally, the effect of the "balance" reached by the court below will be to extend Section 7 protection to practically every conceivable subject unless it is certain to cause disruption. The Fifth Circuit has made an end

run around *Hudgens* and declared the First Amendment and Section 7 protections co-extensive.[18]

18. As noted *supra*, at note 11, the original decision of the Fifth Circuit, before the excision of all First Amendment references, reflects this pre-disposition.

CONCLUSION

The decision of the Fifth Circuit is in conflict with the decisions of four other Circuit Courts. Moreover, the 'reasonable relation" standard adopted by the court below and its interpretation of that standard is out of harmony with decisions of this Court and is erroneous. A definitive resolution of the scope of the "mutual aid or protection" provision of Section 7 of the Act is important to the administration of the National Labor Relations Act. The court below should have remanded the case to the Board for initial "balancing and accommodation' of Section 7 rights and employer property rights. Finally, the court's error in failing to remand was compounded in the improper "balancing" subsequently undertaken. We submit, therefor, that this petition for a writ of certiorari should be granted.

Respectfully submitted,

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September, 1977

Appendix

NEWS BULLETIN TO LOCAL 801 MEMBERS
FROM BOYD YOUNG — PRESIDENT

WE NEED YOU

As a member, we need you to help build the Union through your support and understanding. Too often members become disinterested and look upon their Union as being something separate from themselves. Nothing could be further from the truth.

This Union or any Union will only be as good as the members make it. The policies and practices of this Union are made by the membership—*the active membership*. If this Union has ever missed its target it may be because not enough members made their views known where the final decisions are made—The Union Meeting.

It would be impossible to satisfy everyone with the decisions that are made but the active member has the opportunity to bring the majority around to his way of thinking. This is how a democratic organization works and its the best system around.

Through participation you can make your voice felt not only in this Local but throughout the International Union.

A PHONY LABEL — "right to work"

Wages are determined at the bargaining table and the stronger the Union, the better the opportunity for improvements. The "right to work" law is simply an attempt to weaken the strength of Unions. The misleading title of "right to work" cannot guarantee anyone a job. It simply weakens the negotiating power of Unions by out-

lawing provisions in contracts for Union shops, agency shops, and modified Union shops. These laws do not improve wages or working conditions but just protect free riders. Free riders are people who take all the benefits of Unions without paying dues. They ride on the dues that members pay to build an organization to protect their rights and improve their way of life. At this time there is a very well organized and financed attempt to place the "right to work" law in our new state constitution. This drive is supported and financed by big business, namely the National Right-To-Work Committee and the National Chamber of Commerce. If their attempt is successful, it will more than pay for itself by weakening Unions and improving the edge business has at the bargaining table. States that have no "right-to-work" law consistently have higher wages and better working conditions. Texas is well known for its weak laws concerning the working class and the "right-to-work" law would only add insult to injury. If you fail to take action against the "right-to-work" law it may well show up in wages negotiated in the future. I urge every member to write their state congressman and senator in protest of the "right-to-work" law being incorporated into the state constitution. Write your state representative and state senator and let the delegate know how you feel.

POLITICS and INFLATION

The Minimum Wage Bill, HR 7935, was vetoed by President Nixon. The President termed the bill as inflationary. The bill would raise the present $1.60 to $2.00 per hour for most covered workers.

It seems almost unbelievable that the President could term $2.00 per hour as inflationary and at the same

time remain silent about oil companies profits ranging from 56% to 280%.

It also seems disturbing, that after the price of gasoline has increased to over 50 cents a gallon, that the fuel crisis is beginning to disappear. If the price of gasoline ever reaches 70 cents a gallon you probably couldn't find a closed filling station or empty pump in the Northern Hemisphere.

Congress is now preceeding with a second minimum wage bill that hopefully the President will sign into law. At $1.60 per hour you could work 40 hours a week, 52 weeks a year and never earn enough money to support a family.

As working men and women we must defeat our enemies and elect our friends. If you haven't registered to vote, please do so today.

FOOD FOR THOUGHT

In Union there is strength, justice, and moderation;

In disunion, nothing but an alternating humility and insolence.

COMING TOGETHER WAS A BEGINNING
STAYING TOGETHER IS PROGRESS

WORKING TOGETHER MEANS SUCCESS

THE PERSON WHO STANDS NEUTRAL,
STANDS FOR NOTHING!

JD-(SF)-154-74
Silsbee, Texas

UNITED STATES OF AMERICA
BEFORE THE
NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES
BRANCH OFFICE
SAN FRANCISCO, CALIFORNIA

EASTEX INCORPORATED
and Case No. 23-CA-5085
UNITED PAPERWORKERS INTERNATIONAL
UNION, LOCAL 801

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for the Respondent.

Boyd Young, Union Representative,
of Evadale, Texas, for the
Charging Party.

DECISION

I. Statement of the Case

RICHARD J. BOYCE, Administrative Law Judge: This case was tried before me in Beaumont, Texas, on July 23, 1974. The charge was filed May 2, 1974, and amended June 4, by United Paperworkers International Union, Local 801 (herein called the Union). The com-

plaint issued June 4, 1974, was amended at the trial, and alleges that Eastex Incorporated (herein called Respondent) has violated Section 8(a)(1) of the National Labor Relations Act. Post-trial briefs were filed for the General Counsel and Respondent.

II. Issues

The issues are whether Respondent:

1. At all relevant times maintained no-solicitation and no-posting rules violative of Section 8(a)(1).[1]

2. By prohibiting distribution of a union-sponsored circular on company premises in March-April 1974, violated Section 8(a)(1).

III. Jurisdiction

Respondent is a Texas corporation headquartered in Silsbee, Texas, where it is engaged in the manufacture of paper products. It annually purchases and causes to be shipped into Texas directly from outside the state goods and materials of a value exceeding $50,000.

Respondent is an employer engaged in and affecting commerce within the meaning of Section 2(2), (6), and (7) of the Act.

IV. Labor Organization

The Union is a labor organization within the meaning of Section 2(5) of the Act.

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1. Counsel for the General Counsel makes no reference in his brief to the no-posting rule alleged in the complaint to be unlawful. There being no express abandonment of that allegation, this decision assumes it still to be in the case.

V. The Alleged Unfair Labor Practices

A. The No-Solicitation and No-Posting Rules

1. The Evidence

Respondent and the Union have had a bargaining relationship concerning Respondent's production employees since 1954. The unit consists of about 800 people. The latest bargaining agreement, in effect at all relevant times until its expiration August 1, 1974, contained these provisions:[2]

> Plant Rule 14:
>
> No peddling or soliciting shall be allowed on the premises without permission of the Production Manager. Petitions which are approved by both Management and the Union will be considered for payroll deductions on an individual basis.
>
> Plant Rule 15:
>
> Notices shall not be posted anywhere in the mill except on company designated bulletin boards which are provided for either general notices or union notices. Approval for posting any notice, except union notices designating time and place of union meetings, must be obtained from Management. All boards must be kept neat and orderly.

The same rules, with slight, nonsubstantive variations in language appeared in all earlier agreements between Respondent and the Union. The General Counsel contends that their maintenance by Respondent violated Section 8(a)(1).

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2. It is unknown if a successor agreement has been negotiated; or, if so, it contains these provisions.

Rule 14, according to the uncontroverted testimony of Respondent's personnel director, Leonard Menius, has never been applied "to prevent the Union from soliciting people for union membership or from attempting to collect union dues, assessments, or any other amounts of money due to the Union." Menius continued that the rule is intended to control "people wanting to sell things or peddle things on the premises," not union solicitations. Apart from whatever inference might be drawn from this statement of Rule 14's intent, the record is silent whether it contemplates or ever has been invoked regarding solicitations unrelated to the Union but still protected by Section 7 of the Act. Nor is there evidence that Respondent ever communicated to the employees that union solicitations are exempt from the rule's prohibition; or evidence of overriding considerations of production or employee discipline to be served by the rule, however applied.

Except that which can be divined from its terms, there is no evidence of the purpose and application of Rule 15.

2. Analysis

Plant Rule 14. Rule 14 prohibits "soliciting . . . on the premises without permission of the Production Manager." Application of the rule is not limited by its terms to working time, for "working time" as that notion is used in the context of no-solicitation rules does not connote all time on company premises, only "the period of time that is spent in the performance of actual job duties";[3] nor do its terms exempt solicitations coming within the scope of Section 7 of the Act. Indeed, a fair reading of

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3. *Essex International, Inc.*, 211 NLRB No. 112, slip op. 4.

the rule suggests a contrary, all-inclusive purport on both counts. It follows that the rule is presumptively improper. *Stoddard-Quirk Mfg. Co.*, 138 NLRB 615. See also *Hyland Machine Co.*, 210 NLRB No. 148; *WIPO, Inc.*, 199 NLRB No. 11; *Gooch Packing, Inc.*, 187 NLRB 351; *General Industries Electronics Co.*, 138 NLRB 1371.

The question becomes, then, whether there is evidence overcoming the rule's presumed illegality. There is no evidence that it is necessary to production or employee discipline, so that defense is out. *Stoddard-Quirk Mfg. Co., supra*, at 138 NLRB 621-22. It is no defense, moreover, that the Union agreed to Rule 14 by consenting to its incorporation in bargaining agreements. A union cannot waive the Section 7 solicitation rights of the employees it represents. *N.L.R.B. v. Magnavox Co.*, 85 LRRM 2475 (S. Ct. 1974).

That leaves Respondent's principal line of defense; namely, Menius's disclaimer that the rule was meant to apply to union solicitations, coupled with an absence of evidence that it has been invoked for that purpose.[4] In answer to that defense, there is no evidence that such an exemption ever was communicated to the employees; and no evidence that such an exemption covers all manner of Section 7 solicitations, not just those which are literally "union." Even resolving the latter imponderable favorably to Respondent, we still have a presumptively unlawful rule which, unknown to the employees, is not enforced in an unlawful manner. Nonenforcement does not overcome the adverse presumption. As the Board stated in *A & P Tea Co.*, 162 NLRB 1182, 1184:

4. Respondent's refusal to permit distribution of the union circular, discussed below, was not grounded on Rule 14.

> [W]e reject the Respondent's argument that the rule could have had no coercive effect since it was not enforced. It is well established that the mere existence of an unlawful no-solicitation rule makes it susceptible to application to employees and this factor alone tends to coerce, restrain, and interfere with their right to engage in self-organizational activities.

See also *Leece-Neville Co.*, 159 NLRB 293, 298.

It must be concluded, therefore, that Rule 14 is in violation of Section 8(a)(1).[5]

Plant Rule 15. While Section 7 is read to bestow upon employees the right to solicit or distribue literature on company premises in certain circumstances, it does not bestow upon them a right to use company bulletin boards or other plant surfaces for the posting of information. *Nugent Service, Inc.*, 207 NLRB No. 14, slip op. (JD) 9. The inclusion in the labor agreement of Rule 15, concerning limited use of company bulletin boards, therefore did not constitute an invalid union waiver of a statutory right within the principle of *N.L.R.B. v. Magnovox Co., supra*, but rather an extraction through the bargaining process of a concession Respondent lawfully could have withheld. That being so, there being nothing on the fact of Rule 15 indicative of illegality,[6] and there being no evidence of an improper application of the rule, it is concluded that Rule 15 does not violate the Act.

5. *Mallory Plastics Co.*, 149 NLRB 1649, cited by Respondent urging a contrary conclusion, not only is factually distinguishable from the present case in certain respects, but is of doubtful current validity in light of intervening Board decisions.

6. The requirement in Rule 15 that most notices must be approved by management does not by itself invalidate the rule. *Cf. Gooch Packing, Inc.*, 187 NLRB 351.

B. The Prohibition Against Distributing the Union's Circular

1. The Evidence

In March 1974, the Union's president, Boyd Young, and its executive board decided to distribute this circular among Respondent's employees:

NEWS BULLETIN TO LOCAL 801 MEMBERS
FROM BOYD YOUNG — PRESIDENT

WE NEED YOU

As a member, we need you to help build the Union through your support and understanding. Too often members become disinterested and look upon their Union as being something separate from themselves. Nothing could be further from the truth.

This Union or any Union will only be as good as the members make it. The policies and practices of this Union are made by the membership—*the active membership*. If this Union has ever missed its target it may be because not enough members made their views known where the final decisions are made—The Union Meeting.

It would be impossible to satisfy everyone with the decisions that are made but the active member has the opportunity to bring the majority around to his way of thinking. This is how a democratic organization works and it's the best system around.

Through participation you can make your voice felt not only in this Local but throughout the International Union.

A PHONY LABEL — "right to work"

Wages are determined at the bargaining table and the stronger the Union, the better the opportunity for improvements. The "right-to-work" law is simply an attempt to weaken the strength of Unions. The misleading title of "right-to-work" cannot guarantee anyone a job. It simply weakens the negotiating power of Unions by outlawing provisions in contracts for Union shops. These laws do not improve wages or working conditions but just protect free riders. Free riders are people who take all the benefits of Unions without paying dues. They ride on the dues that members pay to build an organization to protect their rights and improve their way of life. At this time there is a very well organized and financed attempt to place the "right-to-work" law in our new state constitution. This drive is supported and financed by big business, namely the National Right-To-Work Committee and the National Chamber of Commerce. If their attempt is successful, it will more than pay for itself by weakening Unions and improving the edge business has at the bargaining table. States that have no "right-to-work" law consistently have higher wages and better working conditions. Texas is well known for its weak laws concerning the working class and the "right-to-work" law would only add insult to injury. If you fail to take action against the "right-to-work" law it may well show up in wages negotiated in the future. I urge every member to write their state congressman and senator in protest of the "right-to-work" law being incorporated into the state constitution. Write your state representative and state senator and let the delegate know how you feel.

POLITICS and INFLATION

The Minimum Wage Bill, HR 7935, was vetoed by President Nixon. The President termed the bill as inflationary. The bill would raise the present $1.60 to $2.00 per hour for most covered workers.

It seems almost unbelievable that the President could term $2.00 per hour as inflationary and at the same time remain silent about oil companies profits ranging from 56% to 280%.

It also seems disturbing, that after the price of gasoline has increased to over 50 cents a gallon, that the fuel crisis is beginning to disappear. If the price of gasoline ever reaches 70 cents a gallon you probably couldn't find a closed filling station or empty pump in the Northern Hemisphere.

Congress is now proceeding with a second minimum wage bill that hopefully the President will sign into law. At $1.60 per hour you could work 40 hours a week, 52 weeks a year and never earn enough money to support a family.

As working men and women we must defeat our enemies and elect our friends. If you haven't registered to vote, please do so today.

FOOD FOR THOUGHT

In Union there is strength, justice, and moderation:
In disunion, nothing but an alternating humility and insolence.

COMING TOGETHER WAS A BEGINNING

STAYING TOGETHER IS PROGRESS

WORKING TOGETHER MEANS SUCCESS

THE PERSON WHO STANDS NEUTRAL,
STANDS FOR NOTHING!

On about March 26, Hugh Terry, an employee of Respondent and a vice president of the Union, asked Respondent's assistant personnel director, Herbert George, if it would be all right to distribute the circular in "clock alley" at the plant, enabling each employee to get a copy upon clocking in or out.[7] Terry explained that the Union preferred this procedure to mailing because of the high postage rates.[8] George replied that he doubted Respondent would allow the Union to "hand out propaganda like that," but that he would check with "higher management." George presently did check with Leonard Menius, the personnel director, who confirmed that it would not be permitted. George conveyed that message to Terry on about April 1. He did not give Terry any reason for Respondent's position.

On April 22, Union President Young, accompanied by Terry and another employee, raised the matter with George. Young asked if it would be permissible for employees to distribute the circular, on non-working time, anywhere on Respondent's premises—if not in clock alley,

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7. Clock alley is a passageway 6 or 7 feet wide, flanked on either side by administrative offices. In addition to time clocks, the area contains an employee bulletin board and benches and chairs for those waiting to transact business in the offices. Clock alley is physically discrete from the production areas of the plant.

8. The record suggests that the Union's usual past practice was to use the mails when making large-scale distributions, and that Respondent unfailingly provided names and addresses of unit employees for this purpose.

then on an outside walkway or in the parking lot.[9] George initially responded "no", then said he would be glad to "doublecheck" with Menius, which he did. Menius was of the same view, and George informed Young that permission would not be granted. George added, "We feel that you have other ways to communicate with your membership."

Young testified that the Union requested permission for the sake of its "good relationship" with Respondent, not out of any sense that permission was required by the labor agreement or otherwise. The reason for the circular, he testified, was this:

> We were going into negotiations, and . . . we was trying to reorganize our group into a stronger group. We were trying to get members, people that were working there who were nonmembers, and trying to motivate or strengthen the conviction of our members, and it was to organize a little.

Respondent concedes there was no requirement in the labor agreement that permisson be obtained, expressly disavowing the applicability of Plant Rule 14 to the situation. Menius testified that he would not have withheld consent, in clock alley or elsewhere, had the circular been confined to the material under the "We Need You" and "Food for Thought" captions. He objected to the balance of the document, however, testifying, "I didn't

9. George testified: "It was testified here earlier today that a request was made for employees to pass it out. I did not get that impression. My impression was that Boyd Young, himself, wanted to pass out the material, for whatever that is worth." George's "impression" notwithstanding, Young is credited that his request was couched in terms of employees. Young himself is a longtime employee of Respondent, on leave of absence to serve as union president.

see any way in which that was related to our association with the Union."[10]

In times past, Respondent has distributed literature concerning its periodic safety contests from a table in clock alley. The record also tells of instances when politicians and an auto dealer distributed literature on the premises, but Menius insists that Respondent never approved of those activities and stopped them upon detection. In addition, Respondent's supervisors have solicited in the plant in furtherance of charity (United Appeals) and bond (U.S. Savings) drives, and a campaign protesting the expansion of Big Thicket National Park. This apparently consisted of seeking signatures on pledge cards or petitions; there is no evidence that literature was distributed. Finally, information is posted on a bulletin board in clock alley telling the employees how to participate in the Time-Life Books program at a reduced rate.[11]

2. Analysis[12]

The Board stated in *McDonnell Douglas Corporation*, 210 NLRB No. 29, slip op. 1:

10. Further to this point, Respondent notes that, while the commentary in the circular under "Politics and Inflation" deplores the presidential veto of a bill raising the federal minimum hourly wage to $2.00, the lowest hourly wage among Respondent's employees is $3.68.

11. Respondent is a wholly-owned subsidiary of Time, Incorporated.

12. Although most of the cases cited by Respondent on this issue are not mentioned in this decision, they have been considered. If not distinguishable from the present case in their fundamental facts, they embody circuit court repudiations of Board law. Board law, not that of the circuits, is binding in this proceeding. E.g., *Bricklayers Local No. 1*, 209 NLRB No. 123, f.n. 1.

> As in any case which concerns an employer's restraint of employees' efforts to distribute literature upon their employer's plant premises, the first question we must answer is whether the distribution is pertinent to a matter which is encompassed by Section 7 of the Act.

If that pertinence does not exist, there are no restraints in the Act on the employer's power to ban distribution.

Menius, although having no objection to distribution of two sections of the Union's circular, prohibited distribution because he "didn't see any way in which that [the other two sections] was related to our association with the Union." That articulation is not the true test of the requisite Section 7 tie-in. Rather, to quote from *G & W Electric Specialty Co.*, 154 NLRB 1136, 1137-38:

> [T]he protection afforded by Section 7 is not strictly confined to activities which are immediately related to the employment relationship or working conditions. . . . [A]lthough the mandatory subjects of collective bargaining designated in Sections 8(d) and 9(a) relate only to working conditions and the employment relationship, Section 7 provides that employees shall have the right, *inter alia*, to engage in "concerted activities for the purpose of collective bargaining *or other mutual aid or protection.*" [Emphasis supplied.] To construe this provision as protecting only activities directly and immediately involving the employment relationship would therefore be to read the phrase "or other mutual aid or protection" out of the Act.

Illustrative of the reach of this reasoning, the Board found unlawful an employer's ban against on-premises

implementation by its employees of their union's plan to collect money for grape workers attempting to organize in Delano, California (*General Electric Co.*, 169 NLRB 1101); a circuit court found unlawful the discharge of a union president/employee for promoting an employee resolution condemning the employer's posture relative to a strike of another employer's employees [*NLRB v. Peter Cailler Kohler Swiss Chocolates Co.*, 130 F.2d 503 (2d Cir. 1942)]; and another circuit court noted that "mutual aid or protection" in Section 7 includes the "appearance of employee representatives before legislative committees." *Bethlehem Shipbuilding Corp. v. N.L.R.B.*, 114 F.2d 930, 937 (1st Cir. 1940).

Looking at the two sections of the Union's circular on which Menius based Respondent's refusal, one dealt with Texas' so-called right-to-work law, commenting among other things:

> The "right-to-work" law is simply an attempt to weaken the strength of Unions. . . . It simply weakens the negotiating power of Unions. . . . If you fail to take action against the "right-to-work" law it may well show up in wages negotiated in the future. I urge every member to write their state congressman and senator in protest of the "right-to-work" law being incorporated into the state constitution.

Union security being central to the union concept of strength through solidarity, and being moreover a mandatory subject of bargaining in other than right-to-work states, it is plain that this commentary is "pertinent to a matter which is encompassed by Section 7 of the Act" as the Board and courts see it. *Bethlehem Shipbuilding Corp. v. N.L.R.B., supra,* indicates that this conclusion is in

no way negated by the circular's advocacy of political means to the desired end.

The other section on which Menius's refusal was based, dealing with the federal minimum wage law and inflation and urging the election of legislators favorable to a higher minimum wage, also is pertinent in terms of Section 7, even though Respondent's employees receive well over the sought-after minimum wage. The minimum wage inevitably influences wage levels derived from collective bargaining, even those far above the minimum. Beyond that, as the Board observed in *General Electric Co., supra,* at 169 NLRB 1103, concern by Respondent's employees for the plight of other employees "might gain support for them at some future time when they might have a dispute with their employer."

So it is that the sections of the Union's circular cited by Respondent to support its refusal were entitled to those distribution privileges the Act allows, no less than the circular's other portions. But even if they were not, even if Respondent were correct that only portions of the circular bore Section 7 pertinence, Respondent would not thereby have been justified in denying its distribution. Thus, in *Samsonite Corp.*, 206 NLRB No. 91, the Board adopted the decision of Administrative Law Judge Taplitz containing this statement at slip op. (JD) 8:

> The fact that some of the articles in the newsletter contained gratuitous remarks or "social comment" matters does not detract from the conclusion that the distribution . . . was a concerted activity [protected by Section 7].

It being established that the Union's circular was entitled to those distribution privileges allowed by the Act,

the question remains whether Respondent, by banning distribution by employees anywhere on its premises, impinged upon those privileges in violation of Section 8(a)(1). The Board, recognizing inherent differences between solicitations and distributions, permits greater restrictions on Section 7 distributions than solicitations. While a no-solicitation rule generally must be limited to working time, a no-distribution rule properly can extend to working areas even on nonworking time. A no-distribution rule that obtains on nonworking times in nonworking areas, however, is presumptively invalid. Seen generally *Stoddard-Quirk Mfg. Co.,* 138 NLRB 615.

As previously noted, the term "working time" for this purpose "connotes the period of time that is spent in the performance of actual job duties, which would not include [for instance] time allotted for lunch and break periods." *Essex International, Inc.,* 211 NLRB No. 112, slip op. 4. The term "working areas" embraces only those portions of a plant where production tasks actually are performed, and does not include separate time-clock areas (*Massey-Ferguson, Inc.,* 211 NLRB No. 64, slip op. 3-4), much less parking lots and other areas outside the plant.

It is clear, notwithstanding the greater latitude given no-distribution rules, that Respondent's refusal to permit distribution of the Union's circular anywhere on the premises—in clock alley, the outer walkway, or the parking lot—went beyond working time and working areas, and so violated Section 8(a)(1) absent special circumstances. Of the latter, there is neither argument nor proof.[13]

13. "Accordingly," as the Supreme Court said in *N.L.R.B. v.*

VI. Conclusions of Law

A. By maintaining a plant rule/contract provision which prohibits employees from soliciting during nonworking time concerning matters relating to the exercise of their Section 7 rights, Respondent has violated Section 8(a)(1) of the Act.

B. By prohibiting employees from distributing literature on nonworking time in nonworking areas concerning matters relating to the exercise of their Section 7 rights, Respondent has violated Section 8(a)(1) of the Act.

C. These unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

D. Respondent did not otherwise violate the Act in the manner alleged.

Upon the foregoing findings of fact, conclusions of law, and the entire record,[14] and pursuant to Section 10(c)

Magnavox Co., supra, at 85 LRRM 2476, "this is not the occasion to balance the availability of alternative channels of communications against a legitimate employer business justification for barring or limiting inplant communications."

In concluding that the prohibition against distributing the Union's circular violated the Act, it is deemed unnecessary to consider the the charity and bond drives, the campaign concerning Big Thicket National Park, Time-Life Books, and the distributions from clock alley about Respondent's safety contests. Disparate treatment is relevant only in the case of a colorably lawful no-distribution rule, or to show that an employer's stated justifications for a presumptively invalid rule are pretextuous. Further, the charity and bond drives, the Big Thicket campaign, and Time-Life Books were more akin to solicitations than distributions, so would not show disparate treatment in any event. Cf. *Stoddard-Quirk Mfg. Co.*, supra, at 138 NLRB 620 f.n. 6.

14. The word "solicited" on transcript page 37, line 15, hereby is corrected to read "soliciting."

of the Act, I hereby issue the following recommended:[15]

ORDER

Respondent, Eastex Incorporated, its officers, agents, successors, and assigns, shall:

I. Cease and desist from:

A. Maintaining a plant rule or contract provision which prohibits employees from soliciting during nonworking time concerning matters relating to the exercise of their Section 7 rights.

B. Prohibiting employees from distributing literature on nonworking time in nonworking areas concerning matters relating to the exercise of their Section 7 rights.
II. Take the following affirmative action to effectuate the policies of the Act:

A. Post at its plant copies of the attached notice marked "Appendix."[16] Copies of said notice, on forms provided by the Regional Director for Region 23, after being duly signed by an authorized representative of Re-

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15. All outstanding motions inconsistent with this recommended Order hereby are denied. In the event no exceptions are filed as provided by Section 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Section 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.

16. In the event the Board's Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

spondent, shall be posted by Respondent immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to insure that said notices are not altered, defaced, or covered by any other material.

B. Notify the Regional Director for Region 23, in writing, within 20 days from the date of this Order, what steps Respondent has taken to comply herewith.

That portion of the complaint found without merit is dismissed.

Dated: September 5, 1974.

/s/ RICHARD J. BOYCE
Richard J. Boyce
Administrative Law Judge

APPENDIX JD-(SF)-154-74

FORM NLRB-4727 (3-69)

NOTICE TO EMPLOYEES

POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD

AN AGENCY OF THE UNITED STATES GOVERNMENT

The trial held in Beaumont, Texas, on July 23, 1974, in which we participated and had a chance to give evidence, resulted in a decision that we had committed certain unfair labor practices in violation of Section 8(a)(1) of the National Labor Relations Act, as amended, and this notice is posted pursuant to that decision.

Section 7 of the National Labor Relations Act, as amended, gives all employees the following rights:

To organize themselves
To form, join, or support unions
To bargain as a group through a representative they choose
To act together for collective bargaining or other mutual aid or protection
To refrain from any or all such activities

In recognition to these rights, we hereby notiby our employees that:

WE WILL NOT maintain a plant rule or contract provision which prohibits employees from soliciting during nonworking time concerning matters relating to the exercise of their Section 7 rights.

WE WILL NOT prohibit employees from distributing literature on nonworking time in nonworking areas concerning matters relating to the exercise of their Section 7 rights.

EASTEX INCORPORATED
(Employer)

Dated _____ By _____
(Representative) (Title)

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material. Any questions concerning this notice or compliance with its provisions may be directed to the Board's Office, Region 23, One Allen Center, Suite 920, 500 Dallas Avenue, Houston, Texas, 77002 - Telephone Number (713) 226-4271

MFP

215 NLRB No. 58

D--9432

Silsbee, Tex.

UNITED STATES OF AMERICA

BEFORE THE
NATIONAL LABOR RELATIONS BOARD

Case 23—CA—5085

EASTEX INCORPORATED

and

UNITED PAPERWORKERS INTERNATIONAL
UNION, LOCAL 801

DECISION AND ORDER

On September 5, 1974, Administrative Law Judge Richard J. Boyce issued the attached Decision in this proceeding. Thereafter, Respondent filed exceptions and a supporting brief, and the General Counsel filed a brief in support of the Administrative Law Judge's Decision.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Decision in light of the exceptions and briefs and has decided to affirm the rulings, findings, and conclusions of the Administrative Law Judge and to adopt his recommended Order.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge and hereby orders that Respondent, Eastex Incorporated, Silsbee, Texas, its officers, agents, successors, and assigns, shall take the action set forth in the said recommended Order.

Dated, Washington, D.C.

December 4, 1974.

Edward B. Miller, Chairman
John H. Fanning, Member
John A. Penello, Member
National Labor Relations Board

(SEAL)

EASTEX, INCORPORATED,
Petitioner-Cross Respondent,

v.

NATIONAL LABOR RELATIONS BOARD,
Respondent-Cross Petitioner.

No. 74-4156.

UNITED STATES COURT OF APPEALS,

Fifth Circuit.

April 7, 1977.

On petition for review and cross application for enforcement of an order of the National Labor Relations Board, the Court of Appeals, Brown, Chief Judge, held that whatever is reasonably related to employee's jobs or to their status or condition as employees in the plant may be the subject of union handouts, distributed on plant premises in such manner as not to interfere with work, to the full range permitted by the National Labor Relations Act's language, valid local laws, and the First Amendment; and that both disputed parts of union-sponsored circular, the part dealing with "right-to-work" laws and the effort of "big business" to place such a law in the Texas Constitution, and the part pertaining to politics and inflation and specifically to a national minimum wage law, were sufficiently related to employment situations to merit protection under the National Labor Relations Act.

Enforcement granted.

On Petition for Review and Cross-Application for Enforcement of an Order of The National Labor Relations Board (Texas case).

Before BROWN, Chief Judge, and RIVES and GEE, Circuit Judges.

JOHN R. BROWN, Chief Judge:

This case is before the Court upon the petition of Eastex, Incorporated for review and modification of the Board's determination that Eastex violated § 8(a)(1) of the Act, 29 U.S.C.A. § 158(a)(1)[1] by prohibiting distribution by employees on company premises a union sponsored circular on non-working time in non-working areas. The Board has filed a cross-application for enforcement of the order. We enforce the order.

It is startling, and at the same time a tribute to our adversary system which takes cases as they come with no arrogant assumption that decision makers—legislative or judicial—can anticipate all that will follow, that in the hundreds of Labor Board cases in this Court, we have never been faced with quite this problem before. Avoiding the time worn, battle weary cliche of the clean slate, we are, in the Astronautical Age, exploring new space, with only limited or hierarchical limitations imposed.

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1. Section 8(a)(1), 29 U.S.C.A. § 158(a)(1) provides in pertinent part: (a) it shall be an unfair labor practice for an employer—
(1) To interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in § 157 [Section 7] of this title.
Section 7, 29 U.S.C.A. § 157 provides:
"Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection. * * *"

I.

In March 1974, the President and Executive Board of the Union (United Paper Workers International Union, Local 801) decided to distribute the following news bulletin to employees of Eastex.

[1] *WE NEED YOU*[2]

As a member, we need you to help build the Union through your support and understanding. Too often members become disinterested and look upon their Union as being something separate from themselves. Nothing could be further from the truth.

This Union or any Union will only be as good as the members make it. The policies and practices of this Union are made by the membership—*the active membership*. If this Union has ever missed its target it may be because not enough members made their views known where the final decisions are made—The Union Meeting.

It would be impossible to satisfy everyone with the decisions that are made but the active member has the opportunity to bring the majority around to his way of thinking. This is how a democratic organization works and it's the best system around.

Through participation you can make your voice felt not only in this Local but throughout the International Union.

[2] *A PHONY LABEL—"right to work"*

Wages are determined at the bargaining table and

2. The brackets [1], etc. are inserted for ease of reference.

the stronger the Union, the better the opportunity for improvements. The "right-to-work" law is simply an attempt to weaken the strength of Unions. The misleading title of "right-to-work" cannot guarantee anyone a job. It simply weakens the negotiating power of Unions by outlawing provisions in contracts for Union shops, agency shops, and modified Union shops. These laws do not improve wages or working conditions but just protect free riders. Free riders are people who take all the benefits of Unions without paying dues. They ride on the dues that members pay to build an organization to protect their rights and improve their way of life. At this time there is a very well organized and financed attempt to place the "right to work" law in our new state constitution. This drive is supported and financed by big business, namely the National Right-To-Work Committee and the National Chamber of Commerce. If their attempt is successful, it will more than pay for itself by weakening Unions and improving the edge business has at the bargaining table. States that have no "right-to-work" law consistently have higher wages and better working conditions. Texas is well known for its weak laws concerning the working class and the "right-to-work" law would only add insult to injury. If you fail to take action against the "right-to-work" law it may well show up in wages negotiated in the future. I urge every member to write their state congressman and senator in protest of the "right-to-work" law being incorporated into the state constitution. Write your state representative and state senator and let the delegate know how you feel.

[3] *POLITICS and INFLATION*

The Minimum Wage Bill, HR 7935, was vetoed by President Nixon. The President termed the bill as inflationary. The bill would raise the present $1.60 to $2.00 per hour for most covered workers.

It seems almost unbelievable that the President could term $2.00 per hour inflationary and at the same time remain silent about oil companies profits ranging from 56% to 280%.

It also seems disturbing, that after the price of gasoline has increased to over 50 cents a gallon, that the fuel crisis is beginning to disappear. If the price of gasoline ever reaches 70 cents a gallon you probably couldn't find a closed filling station or empty pump in the Northern Hemisphere.

Congress is now proceeding with a second minimum wage bill that hopefully the President will sign into law. At $1.60 per hour you could work 40 hours a week, 52 weeks a year and never earn enough money to support a family.

As working men and women we must defeat our enemies and elect our friends. If you haven't registered to vote, please do so today.

[4] *FOOD FOR THOUGHT*

In Union there is strength, justice, and moderation;
In disunion, nothing but an alternating humility and insolence.

COMING TOGETHER WAS A BEGINNING

STAYING TOGETHER IS PROGRESS

WORKING TOGETHER MEANS SUCCESS

THE PERSON WHO STANDS NEUTRAL, STANDS FOR NOTHING!

On March 26, 1974, Hugh Terry, an Eastex employee and Union vice-president sought permission from George, the assistant personnel director, to hand out the bulletin in non-working areas during non-working time. George's response was that he doubted Eastex would allow the distribution but he would check with higher management. Later, Boyd Young, Union President, and other employees of Eastex raised the matter with George. He again denied permission to distribute the bulletin. Upon consultation with Leonard Menius, Eastex's Personnel Director, George confirmed that Eastex's final position would be to deny permission for distribution of the bulletin.

The Administrative Law Judge found that Eastex maintained no-solicitation and no-posting rules[3] in violation of § 8(a)(1). But it is clear that Rule 14, no-solicitation,

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3. Plant Rule 14:
No peddling or soliciting shall be allowed on the premises without permission of the Production Manager. Petitions which are approved by both Management and the Union will be considered for payroll deductions on an individual basis.
Plant Rule 15:
Notices shall not be posted anywhere in the mill except on company designated bulletin boards which are provided for either general notices or union notices. Approval for posting any notice, except union notices designating time and place of union meetings, must be obtained from Management. All boards must be kept neat and orderly.
Eastex did not before the Board, or here, challenge the ALJ's order as to the rules.

played no part in its decision to prohibit distribution of the bulletin. This conclusion is corroborated by Young's testimony that the request was made not because of a contract or rule but to continue good relationship with Eastex.

Eastex took the position that the second and third sections of the bulletin,[4] "[2] A Phony Label—'Right To Work'" and "[3] Politics and Inflation," were purely political and did not pertain to anything over which it had authority or power to change or control. Eastex thus asserts that these sections were not matters related to the exercise of § 7 rights, 29 U.S.C.A. § 157. The Board found that parts [2] and [3] of the bulletin were protected by § 7 and that Eastex had violated § 8(a)(1) of the Act. We agree that the bulletin was protected by § 7 and inescapably it follows that Eastex violated § 8(a)(1) in prohibiting its distribution.

II.

Section 7, 29 U.S.C.A. § 157, guarantees to employees the "right to self-organization, to form, join, or assist labor organizations, to bargain collectively * * * and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection. * * *" Section 8, 29 U.S.C.A. § 158, condemns as an unfair labor practice interference by an employer in the exercise of those rights.

The pivotal point of this decision rests upon the classification of the activity—was the admittedly concerted

4. Menius, Eastex's Personnel Director, did not object to the distribution of part "[1] We Need You," and part "[4] Food For Thought," of the bulletin. Nor does it on appeal.

activity for the purpose of collective bargaining or other mutual aid or protection, or was it completely outside of the protection of § 7. In essence, we must determine if this bulletin concerned matters relating to the exercise of § 7 rights. If the activity was under the protective umbrella of § 7, the employer committed an unfair labor practice by interfering in the exercise of the right. If it was not, the employer's prohibition on distribution would furnish no basis for a finding of unfair labor practice.

[1] Eastex prohibited distribution of the bulletin because parts [2] and [3] were purely political and did not pertain to anything over which "Eastex had the authority or power to change or control." We do not accept Eastex's position. Both parts are sufficiently related to employment situations to merit § 7 protection. Although a number of Circuits in a variety of circumstances unlike those here have nominally declared that the test of whether the activity is protected is whether it pertains to something over which the employer has it within his power or authority to change or control,[5] we think that is too narrow.

5. *See NLRB v. Leslie Metal Arts Co., Inc.*, 6 Cir., 1975, 509 F.2d 811, 813 ("Protected activity must in some fashion involve employees' relations with their employer. * * *"); *Shelly & Anderson Furniture Mfg. Co. v. N.L.R.B.*, 9 Cir., 1974, 497 F.2d 1200 (protected activity must seek a specific remedy for a work-related complaint or grievance); *NLRB v. Tanner Motor Livery, Ltd.*, 9 Cir., 1969, 419 F.2d 216 (the mutual aid clause of § 7 "protects concerted activities which have to do with terms and conditions of employment"); *G & W Electric Specialty Co. v. NLRB*, 7 Cir., 1966, 360 F.2d 873 (when the activity of the employee does not involve a request for any action on the part of the company or does not concern a matter over which the company has any control such action is not within the other mutual aid or protection of 29 U.S.C.A. § 157); *NLRB v. Bretz Fuel Co.*, 4 Cir., 1954, 210 F.2d 392, 396 ("Concerted activity is protected only where such activity is intimately connected with the employees' immediate employment").

The fact is that Courts have not been this stringent in the day to day application to the infinite complexities of industrial-collective bargaining life. The horizon of § 7 rights is not confined to the factory wall or the perimeters of the battlefield *vis-a-vis* employer-employees.[6]

Since authorities among (and within) the circuits are not consistent on the point, and the Supreme Court has not yet spoken definitively, we are compelled to offer another view to march in company along the way toward a synthesis.

The synthesis involves, of course, arriving at an accommodation between two sets of rights broadly hostile to each other. One set comprises the rights of the proprietor-employer arising from his ownership and control of the plant premises. Among these is the right to prescribe what those whom he invites on his property

6. *See Fort Wayne Corrugated Paper Co. v. NLRB,* 7 Cir., 1940, 111 F.2d 869; *accord, Bethlehem Shipbuilding Corp. v. NLRB,* 1 Cir., 1940, 114 F.2d 930, *cert. denied,* 1941, 312 U.S. 710, 61 S.Ct. 448, 85 L.Ed. 1141. In *NLRB v. Peter Cailler Kohler Swiss Chocolates Co.,* 2 Cir., 1942, 130 F.2d 503, cited with approval in *NLRB v. Weingarten, Inc.,* 1975, 420 U.S. 251, 95 S.Ct. 959, 43 L.Ed.2d 171 and *Houston Insulation Contractors Assn.,* 1967, 386 U.S. 664, 87 S.Ct. 1278, 18 L.Ed.2d 389, this principle was given a more detailed analysis. *See also NLRB v. General Electric Co.,* 9 Cir., 1969, 411 F.2d 750, *aff'g* 169 N.L.R.B. 1101 (1968) (the Ninth Circuit agreed that the protection of § 7 extends to the collection of funds by union members on their employer's property for the striking employees of another unrelated employer); *Signal Oil & Gas Co. v. NLRB,* 9 Cir., 390 F.2d 338; *NLRB v. J. G. Boswell Co.,* 9 Cir., 1943, 136 F.2d 585. Likewise, making of complaints by employees to appropriate government agencies is among the concerted activities protected by the Act. *NLRB v. Shipbuilding Local 22,* 1968, 391 U.S. 418, 424, 88 S.Ct. 1717, 20 L.Ed.2d 706, 712; *Socony Mobil Oil Co., Inc. v. NLRB,* 2 Cir., 1966, 357 F.2d 662, 664; *Walls Mfg. Co. v. NLRB,* 1963, 116 U.S. App. D.C. 140, 321 F.2d 753, *enf'g* 137 N.L.R.B. 1317 (1962), *cert. denied,* 1963, 375 U.S. 923, 84 S.Ct. 265, 11 L.Ed.2d 166.

shall and shall not do while there. The other set of rights are those granted employees by § 7, rights "to self-organization . . . to bargain collectively . . . and to engage in *other* concerted activities for the purpose of collective bargaining or *other mutual aid or protection.* . . ." 29 U.S.C.A. § 157 (emphasis added).

Whatever the scope of § 7 rights may be when exercised off the employer's property,[7] at the plant gate they enter as a wedge driven in the employer's mass of proprietary ones, and as such, on this terrain they come under especial pressure. Yet it seems clear that they should not be unduly compressed there, since it is only there that the employees assemble in their full capacity as such, with attendant ease of communication with each other and with management, and with confrontation of daily problems, subjection to working conditions and discipline, etc. Again and again, accommodation is called for. What is to be the informing principle upon which reaching it proceeds?

[2, 3] The key to determining what § 7 permits employees to *say* inside the gates of the plant does not lie in restricting the scope of Congress' language employed in § 7[8] or in requiring a tone more deferential and a subject matter more restricted than the First Amendment permits. Instead it lies in consulting the purpose for which the employees are invited inside these gates at all.[9] That

7. Doubtless there limited only by valid general law of the situs and the First Amendment.

8. As does the "employer's control" test noted and disapproved.

9. Such a rule of reason was followed by the Supreme Court in the somewhat different context of *Lloyd Corp. v. Tanner,* 1972, 407 U.S. 551, 92 S.Ct. 2219, 33 L.Ed.2d 131, and was presaged by the

purpose is to do just one thing: to work at their jobs in that plant. We hold that whatever is reasonably related to the employees' *jobs* or to their status or condition as employees in the plant may be the subject of such handouts as we treat of here, distributed on the plant premises in such a manner as not to interfere with the work, to the full range permitted by § 7's language, valid local laws and the First Amendment. Instead of the rigid employer control formulation, we think the policies of the Act and a synthesis of what courts have done—not always said—require that we adopt this reasonably job related test.

Showing that determination ought not to be compelled by some rigid formulation of the past,[10] the Ninth Circuit's recent decision in *Kaiser Engineers v. NLRB,* 9 Cir., 1976, 538 F.2d 1379, points the way.

In *Kaiser Engineers v. NLRB, supra,* in enforcing the Board's order that Kaiser Engineers had engaged in unfair labor practices, the Ninth Circuit reasoned that direct control by the company over the matter was not the decisive factor. The finding of unfair labor practice was

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dissent of Mr. Justice White in *Food Employees Local 590 v. Logan Valley Plaza,* 1968, 391 U.S. 308, 337, 88 S.Ct. 1601, 20 L.Ed.2d 603. There in determining public rights to handbill in a shopping center, the Court consulted the purpose for which the public was admitted.

10. In *Shelly & Anderson Furniture Mfg. Co., Inc. v. NLRB* 9 Cir., 1974, 497 F.2d 1200, the Ninth Circuit embraced a commentator to declare that for § 7 protection the activity must satisfy these elements:

> "(1) there must be a work-related complaint or grievance; (2) the concerted activity must further some group interest; (3) a specific remedy or result must be sought through such activity; and (4) the activity should not be unlawful or otherwise improper. 18B Business Organizations, Kheel, Labor Law § 10.02 [3], at 10-21 (1973).

based on Kaiser Engineers' discharge of a civil engineer for having signed and joined with other employees in a joint letter written to United States legislators stating their opposition to a competitor's application to Immigration Authorities for authorization to import foreign engineers. Kaiser contended that the activity was not "for mutual aid or protection within the meaning of § 7" and that "protected activity under § 7 [was] limited to [an] activity taking place within the employer-employee relationship and relating to the terms and conditions of employment". 538 F.2d at 1384. The Court, in rejecting this contention, reasoned:

> It is true, that the activity involved no request for action on the part of the company, did not concern a matter over which the company had direct control, and was outside the strict confines of the employment relationship. It is also true, however, that the members of the Civil Engineering Society had a legitimate concern in national immigration policy insofar as it might affect their job security. *Id.* at 1385.

The Court held that:

> "[C]oncerted activity of employees, lobbying legislators regarding changes in national policy which affect their job security, can be action taken for 'mutual aid or protection' within the meaning of § 7. * * *" *Id.*

III.

Before analyzing the challenged parts [2] and [3] some observations are in order. At the outset—although this rubs both ways—the publication was so neutral as to Eastex that it does not even remotely come close to that

category[11] of non-protected distributions which attacking the very enterprise to which workers owe their jobs malign, ridicule or attack the management's conduct of the employer's business. Next, and very important, the distribution of the pamphlet was not some guided or unguided hope of finding a captive audience for propaganda on contemporary political issues unrelated to the interests of the workers or the union as their statutory bargaining agent. On the contrary, the evidence is uncontradicted and presumably credited by the ALJ that it was done out of direct, tangible employee-union self interest. Negotiations for renewal of the collective bargaining contract were just a few months away. This prospect called for increased support and solidarity on the part of the workers, and to that end recruitment of more members from those who, under Texas right to work laws, did not have to belong to the union.[12]

In this effort which neither employer nor Court can censor, it is at least reasonable for the union to think

11. *See, e. g., NLRB v. Local 1229, IBEW,* 1953, 346 U.S. 464, 74 S.Ct. 172, 98 L.Ed. 195; *Maryland Drydock Co. v. NLRB,* 4 Cir., 1950, 183 F.2d 538.

Although some courts have held that employees are not free to distribute this type of material under the protective shield of § 7, without deciding it, we raise the question: Why should they not, so long as management's proper functions and prerogatives are not interfered with by disobedience or economic pressure? Have not the employees an interest in the prudent conduct of the business (and the consequent preservation of their jobs) sufficient to permit them to *speak* on these matters?

12. Young, the union president stated the reasons for wanting to distribute the pamphlet:

> "We were going into negotiations, and . . . we was trying to reorganize our group into a stronger group. We were trying to get members, people that were working there who were nonmembers, and try to motivate or strengthen the conviction of our members, and it was to organize a little." R. 16.

that accomplishing these goals would be enhanced by showing first a sensitive concern for workers' interests in contemporary social-economic-political problems and, second, a strong stand on such issues.

IV.

On can hardly imagine a matter on which organized labor—for its members as well as for non-members for whom the union owes the obligation of good faith bargaining—has a more direct interest than right-to-work laws. If, for example, as frequently recurs, a movement was then under weigh to repeal existing right-to-work laws no one under any § 7 standard could question the right of the workers to inform their fellows as to the necessity for concern and action. To this Eastex counters that with the law already on the books[13] the appeal to use pressure against a prospective constitutional mandate[14] was too

13. In 1947, the Texas Legislature enacted its original right to work law, codified at Tex. Rev. Civ. Stat. Ann. art. 5207a (1971). In 1955, the following right to work law was enacted:

> Section 1. It is hereby declared to be the public policy of the State of Texas that the right of persons to work shall not be denied or abridged on account of membership or non-membership in any labor union or labor organization and that in the exercise of such rights all persons shall be free from threats, force, intimidation or coercion.

Tex. Rev. Civ. Stat. Ann. art. 5154g, § 1 (1971).

14. At the time the Union and employees were attempting to distribute the bulletin, the Texas Legislature had created and the voters approved the establishment of a Constitutional Revision Commission and the convening of the 63rd Legislature as a Constitutional Convention to propose a revised Constitution to the voters of Texas. *See* Tex. Const. art. XVII, § 2. The Constitutional Revision Commission held public hearings on the need for constitutional change and reported its findings and recommendations to the 63rd Legislature which later convened as the Constitutional Convention of 1974. Using the recommendations of the Commission as a starting point,

remote. But this again ignores the immediate self interest of workers in Texas—including those in the Texas "open shop" of Eastex. It is one thing to face a statutory scheme which is open to legislative modification or repeal. It is quite another thing to face the prospect that such a scheme will be frozen in a concrete constitutional mandate.

That the suggestion was to appeal to congressmen and senators rather than to members of the constitutional revision convention goes only to the method of exercising the cherished right of petition.

[4] Part [2] appeals to the workers with respect to circumstances that involve the effectiveness of the union as an institution. The workers have a real interest in bringing to bear whatever political pressure they might

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the Convention began the task of revising the state constitution.

The right to work issue was very much alive during the Convention, although it was not a recommendation reported from the Commission. A proposal to place the provision in the state constitution had been submitted to the Convention by its General Provisions Committee. *See* General Provisions Official Comm. Report art. X, Tex. Const'l Convention (1974); Preliminary Proposals of the Tex. Const'l Convention of 1974 art. X, § 22 (April 6, 1974). This provision, which would have been submitted to the voters as a separate proposal, was a "highly-charged emotional" issue on and off the convention floor. The possibility that right to work would achieve constitutional standing invoked the concern and interest of organized labor. The Convention failed to adopt the proposed constitution and thus it was never submitted to the voters. In the opinion of one commentator, "[I]f nobody had ever mentioned right to work . . . the convention would probably have adopted a constitution". See Braden, Citizens' Guide To The Proposed New Texas Constitution 60 (1975). This statement accentuates the degree of controversy generated by this issue.

As an additional historical point, it should be pointed out that the 64th Legislature in 1975, in an effort to salvage the labors of the Commission and the Convention of 1974, avoided the right to work issue. The proposed constitution that was put to the voters on November 4, 1975 did not contain a right to work measure. However, the constitution was rejected.

have in order to affect conditions they perceive to be a threat or, vice versa, in their favor. It was within § 7 protection.

V.

Although a bit more tenuous, we think part [3] "Politics and Inflation", is, likewise, protected. Clearly, a minimum wage law even in a company that has a minimum wage of $3.86[15] has a great deal of bearing, from an economic standpoint, on employment and wage levels. Minimum wage is a recurring item in annual negotiations between unions and employers. The national minimum wage may very well have a direct bearing on skilled labor beyond those covered under the minimum wage act. We need not rely on what we in our non-judicial lives observe in the continuous escalation of wage rates with successful arguments that for each level of employment the minimum has to exceed the federal statutory minimum. For here the Board, adopting ALJ has, in its expertise declared that the "minimum wage inevitably influences wage levels derived from collective bargaining, even those far above the minimum". R. 115.

VI.

[5] Although holding that this literature was protected, we feel compelled to reject outright the Board's second argument. The Board would have us hold that once a protected activity is found then any material that is neutral would be permissible. The material must be reasonably related to employment activities, and the

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15. Boyd Young testified that the minimum wage rate at Eastex as of April 22, 1974 was $3.86 an hour.

presence of some § 7 protected material will not rescue that which is significantly not protected.

[6] We must also reject the Board's argument that the least Eastex could have done was to excise the objectionable portions of the bulletin and permit the distribution of the unobjectionable portion. Requiring this of the employer would inevitably place it in the position of editing the proposals of the union and employees. To allow this would give rise to some very dangerous things. The union could not fully express its views in its own way. The strength of the bargaining process would be seriously diluted. We not only think the employer does not have the duty to edit union material, we also would regard it as an impermissible activity on the part of the employer to undertake such efforts, fraught as they would be with a new charge of §§ 7, 8 violations and a court sanctioned interference with First Amendment rights. *See NLRB v. Magnavox Co.*, Tenn., 1974, 415 U.S. 322, 94 S.Ct. 1099, 39 L.Ed.2d 358.

As Eastex does not here question the Board's order on the distribution-solicitation rules (see note 3, *supra*) we make no comment thereon.

ENFORCEMENT GRANTED.

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

NO. 74-4156

EASTEX INCORPORATED,
Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

JUDGMENT

Before: BROWN, Chief Judge, and RIVES and GEE, Circuit Judges.

THIS CAUSE came on to be heard upon a petition filed by Eastex Incorporated, Silsbee, Texas, to review an order of the National Labor Relations Board issued against said Petitioners, its officers, agents, successors, and assigns, on December 4, 1974, and upon a cross-application filed by the National Labor Relations Board to enforce said Order. The Court heard argument of respective counsel on November 11, 1975, and has considered the briefs and transcript of record filed in this cause. On April 7, 1977, the Court issued an Order granting enforcement of the Board's order.

ON CONSIDERATION WHEREOF, it is ordered and adjudged by the United States Court of Appeals for the Fifth Circuit that the said order of the National Labor Relations Board in said proceeding be enforced, and that Petitioner, its officers, agents, successors, and assigns, abide by and perform the directions of the Board in said order contained.

Entered: April 29, 1977

EASTEX, INCORPORATED,
Petitioner-Cross Respondent,

v.

NATIONAL LABOR RELATIONS BOARD,
Respondent-Cross Petitioner.

NO. 74-4156.

UNITED STATES COURT OF APPEALS,
Fifth Circuit.

Aug. 5, 1977.

After it enforced an order of the National Labor Relations Board, relating to distribution of union handouts on plant premises, 550 F.2d 198, the Court of Appeals, on the employer's petition for rehearing and petition for rehearing en banc, held that references in its prior opinion to the First Amendment would be stricken.

Petitions for rehearing denied.

On Petition for Review and Cross-Application for Enforcement of an Order of The National Labor Relations Board (Texas case).

ON PETITION FOR REHEARING
AND PETITION FOR REHEARING EN BANC

(Opinion April 7, 1977, 5 Cir., 1977, 550 F.2d 198)

Before BROWN, Chief Judge, RIVES and GEE, Circuit Judges.

PER CURIAM:

Petitioner-Cross Respondent, Eastex, Inc. (Eastex) states in its petition for rehearing en banc that our de-

cision enforcing the Board's determination that distribution by employees on company premises of a union sponsored circular on non-working time in non-working areas was protected by § 7 of the Act, 29 U.S.C.A. § 157 is contrary to Supreme Court decisions. Specifically, Eastex asserts that: (1) we "failed to adhere to the standard established by the Supreme Court in *Hudgens v. NLRB*, 1976, 424 U.S. 507, 96 S.Ct. 1029, 47 L.Ed.2d 196, that union activities must be accommodated to the employer's property rights in a way that involves minimal interference with those property rights"; (2) the reasonable relationship test that we employed in determining what could be the subject of handouts was erroneous in that it would allow disproportionate and excessive interference with the employer's property rights. We disagree for the following reasons.

In *Hudgens v. NLRB*, the Supreme Court rejected the notion that warehouse employees had a First Amendment right to picket their employer's retail store at a privately owned shopping center. The Court held that under the circumstances of the case, the rights and liabilities of the parties were exclusively dependent upon the National Labor Relations Act. 424 U.S. 521, 96 S.Ct. 1029. Further, the Court pointed out that under the Act, the Board's responsibility, subject to judicial review, was to resolve conflicts between § 7 rights and property rights, and to seek a proper accommodation between the two. *Id.* In attacking the panel decision, Eastex claims no balancing process was invoked in any of the administrative or judicial decisions in the case.

While we did not specifically cite *Hudgens*, we did recognize and necessarily applied the balancing test.

> The synthesis involves, of course, arriving at an accommodation between two sets of rights broadly hostile to each other. One set comprises the rights of the proprietor-employer arising from his ownership and control of the plant premises. Among these is the right to prescribe what those whom he invites on his property shall and shall not do while there. The other set of rights are those granted employees by § 7 . . . . *Eastex, Inc. v. NLRB*, 5 Cir., 1977, 550 F.2d 198, 202.

We were conscious of *Hudgens* and utilized its accommodation principles and balancing test in determining who should prevail. As further evidence of our awareness of the opinion, we recognized that § 7 rights, whatever the scope, when exercised at the employer's gate collide with the employer's proprietary rights and as such come under especial pressure. *Id.* at 203.

The *Hudgens* decision recites that its intention was to clear the confusion wrought by *Lloyd Corp. v. Tanner*, 1972, 407 U.S. 551, 92 S.Ct. 2219, 33 L.Ed.2d 131, and its effect on *Amalgamated Food Employees Local 590 v. Logan Valley Plaza*, 1968, 391 U.S. 308, 88 S.Ct. 1601, 20 L.Ed.2d 603, as to the applicability of the First Amendment or labor law principles in cases of this kind. Although there was considerable disagreement as to whether *Lloyd Corp.* overruled *Logan Valley*,[1] the majority reasoned the First Amendment did not lend its protection to the circumstances and activity in issue.

1. Writing for the Court, Justice Stewart stated: "the rationale of Logan Valley did not survive . . . the Lloyd case . . . the ultimate holding in Lloyd amounted to a total rejection of the holding in Logan Valley. . . ." 424 U.S. 518, 96 S.Ct. 1036. Although concurring in the decision, Chief Justice Burger and Justice Powell did not agree that *Lloyd Corp.* overruled *Logan Valley*. Justice White concurred in the result but stated *Lloyd Corp.* did not overrule *Logan Valley*, either expressly or implicitly. Justices Brennan and Marshall dissented.

In light of this reasoning, we think it better to delete any reference to the First Amendment contained in our prior opinion. Eastex's petition does not specifically complain of the references. However, it has alerted us to our sentences wherein we speak of the permissible scope of activity as sanctioned by the First Amendment. We therefore delete the italicized portion from the following sentence:

> The key to determining what § 7 permits employees to say inside the gates of the plant does not lie in restricting the scope of Congress' language employed in § 7 *or in requiring a tone more deferential and a subject matter more restricted than the First Amendment permits.* (Citations omitted). 550 F.2d 203.

We also delete the following italicized portion from the sentence in the second paragraph, page 203, of our prior opinion:

> We hold that whatever is reasonably related to the employees' jobs or to their status or condition as employees in the plant may be the subject of such handouts as we treat of here, distributed on the plant premises in such a manner as not to interfere with the work to the full range permitted by § 7's language, [and] valid local laws *and the First Amendment*. 550 F.2d 203.

The First Amendment problem is left for another day and time, if ever.

The Petition for Rehearing is DENIED and no member of this panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, F.R.A.P.; Local Fifth Circuit Rule 12), the Petition for Rehearing En Banc is DENIED.

APPENDIX

IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-453

EASTEX, INCORPORATED,
Petitioner

v.

NATIONAL LABOR RELATIONS BOARD,
Respondent

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

Petition for Certiorari Filed September 22, 1977

Certiorari Granted January 23, 1978

Alpha Law Brief Co., One Main Plaza, No. 1 Main St., Houston, Texas 77002

IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

NO. 77-453

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Respondent

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The Appendix contained in Eastex' Petition for Writ of Certiorari includes the following:

CHRONOLOGICAL LIST OF RELEVANT DOCKET ENTRIES

May 2, 1974	Charge No. 23-CA-5085 filed
June 4, 1974	Amended Charge filed
June 4, 1974	Complaint and Notice of Hearing issued
June 6, 1974	Petitioner's Answer filed
July 23, 1974	Hearing
September 5, 1974	Decision of Administrative Law Judge Richard J. Boyce issued
September 23, 1974	Petitioner's exceptions to the decision of the Administrative Law Judge filed
December 4, 1974	Decision and order issued by the National Labor Relations Board
December 17, 1974	Petition of Eastex, Inc. for Modification filed in the Fifth Circuit Court of Appeals, No. 74-4156
January 27, 1975	Cross-Application for Enforcement filed by NLRB
April 29, 1977	Opinion and Judgment of the Fifth Circuit Court of Appeals granting enforcement
May 12, 1977	Eastex' Petition for Rehearing *En Banc* filed
August 5, 1977	Petition for Rehearing denied
August 11, 1977	Eastex' Motion for Stay of Mandate filed
August 24, 1977	Stay of Mandate granted to September 23, 1977
September 22, 1977	Petition for Writ of Certiorari filed
December 16, 1977	Brief in Opposition for the NLRB filed
January 23, 1978	Petition granted

Joint Exhibit No. 1

NATIONAL LABOR RELATIONS BOARD

In the matter of Eaton Corporation
Date 7/23/77 Witness ____ By the Court
No. Pages 3

NEWS BULLETIN To LOCAL 801 MEMBERS
FROM BOYD YOUNG - PRESIDENT

(1) WE NEED YOU

As a member, we need you to help build the Union through your support and understanding. Too often members become disinterested and look upon their Union as being something separate from themselves. Nothing could be further from the truth.

This Union or any Union will only be as good as the members make it. The policies and practices of this Union are made by the membership-the active membership. If this Union has ever missed its target it may be because not enough members made their views known where the final decisions are made - The Union Meeting.

It would be impossible to satisfy everyone with the decisions that are made but the active member has the opportunity to bring the majority around to his way of thinking. This is how a democratic organization works and it's the best system around.

Through participation you can make your voice felt not only in this Local but throughout the International Union.

(2) A PHONY LABEL - "right to work"

Wages are determined at the bargaining table and the stronger the Union, the better the opportunity for improvements. The "right-to-work" law is simply an attempt to weaken the strength of Unions. The misleading title of "right-to-work" cannot guarantee anyone a job. It simply weakens the negotiating power of Unions by outlawing provisions in contracts for Union shops, agency shops, and modified Union shops. These laws do not improve wages or working conditions but just protect free riders. Free riders are people who take all the benefits of Unions without paying dues. They ride on the dues that members pay to build an organization to protect their rights and improve their way of life. At this time there is a very well organized and financed attempt to place the "right to work" law in our new state constitution. This drive is supported and financed by big business, namely the National Right-To-Work Committee and the National Chamber of Commerce. If their attempt is successful, it will more than pay for itself by weakening Unions and improving the edge business has at the bargaining table. States that have no "right-to-work" law consistently have higher wages and better working conditions. Texas is well known for its weak laws concerning the working class and the "right-to-work" law would only add insult to injury. If you fail to take action against the "right-to-work" law it may well show up in wages negotiated in the future. I urge every member to write their state congressman and senator in protest of the "right-to-work" law being incorporated into the state constitution. Write your state representative and state senator and let the delegate know how you feel.

(3) POLITICS and INFLATION

The Minimum Wage Bill, HR 7935, was vetoed by President Nixon. The President termed the bill as inflationary. The bill would raise the present $1.60 to $2.00 per hour for most covered workers.

It seems almost unbelievable that the President could term $2.00 per hour as inflationary and at the same time remain silent about oil companies profits ranging from 56% to 280%.

It also seems disturbing, that after the price of gasoline has increased to over 50 cents a gallon, that the fuel crisis is beginning to disappear. If the price of gasoline ever reaches 70 cents a gallon you probably couldn't find a closed filling station or empty pump in the Northern Hemisphere.

Congress is now preceeding with a second minimum wage bill that hopefully the President will sign into law. At $1.60 per hour you could work 40 hours a week, 52 weeks a year and never earn enough money to support a family.

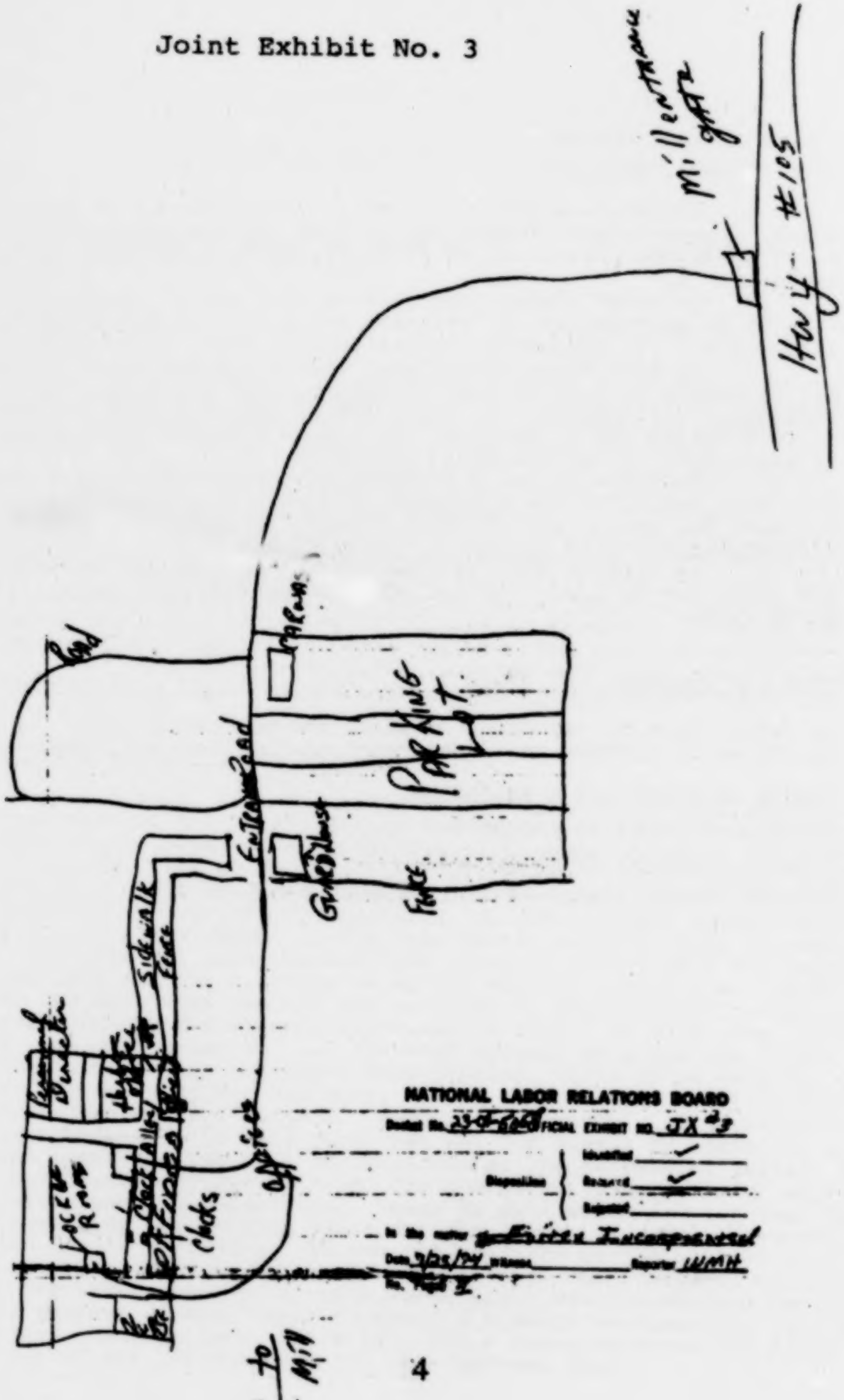
As working men and women we must defeat our enemies and elect our friends. If you haven't registered to vote, please do so today.

(4) FOOD FOR THOUGHT

In Union there is strength, justice, and moderation;
In disunion, nothing but an alternating humility and insolence.

COMING TOGETHER WAS A BEGINNING
STAYING TOGETHER IS PROGRESS
WORKING TOGETHER MEANS SUCCESS
THE PERSON WHO STANDS NEUTRAL, STANDS FOR NOTHING!

Joint Exhibit No. 3



[1]

BEFORE THE

NATIONAL LABOR RELATIONS BOARD

Twenty-third Region

Case No. 23-CA-5058

In the Matter of:

EASTEX, INCORPORATED

— and —

UNITED PAPERWORKERS INTERNATIONAL UNION, LOCAL 801

Room 227,
U. S. Post Office Building
Beaumont, Texas
Tuesday, July 23, 1974.

The above-entitled matter came on for hearing pursuant to notice, at 10:00 a.m.

BEFORE:

HON. RICHARD J. BOYCE, Administrative Law Judge

APPEARANCES:

FRANK L. CARRABBA, Esq., National Labor Relations Board, Region Twenty-Three, One Allen Center, Suite 920, 500 Dallas Avenue, Houston,

[1]

Texas 77002; appearing as counsel for the general Counsel.

TOM M. DAVIS, Esq., Baker & Botts, 3000 One Shell Plaza, Houston, Texas 77002; appearing on behalf of the Respondent.

BOYD YOUNG, Representative of the United Paperworkers International Union, Local 801, P.O. Box 598, Evadale, Texas 77615; appearing on behalf of the Charging Party.

* * *

[11]

* * *

BOYD YOUNG

was called as a witness by and on behalf of the General Counsel and, having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

Q. (By Mr. Carrabba) Mr. Young, would you state your name and address for the record, please?

A. Boyd Young, P. O. Box 242, Evadale, Texas.

Q. Mr. Young, by whom are you employed?

A. Eastex, Incorporated.

Q. Are you currently an employee of Eastex?

A. Yes, but I am on an extended leave of absence to work for the Union.

Q. And what is—when did you go on an extended leave of absence?

[12]

A. I took a leave last October 8th.

Q. Would that be 1973?

A. That's correct.

Q. And are you currently employed by anybody other than Eastex?

A. No, Eastex, and I hold a local office at the Local 801, which is the bargaining unit at Eastex.

Q. What is the full name of the Union that you are

[12]

holding an office in?

A. United Paperworkers International Union, and I hold office in Local 801.

Q. What office do you hold?

A. President.

Q. Do you hold any office with the International?

A. Yes. I am representative.

Q. Mr. Young, is there currently in existence a collective bargaining agreement with Eastex by the Union?

A. Yes, sir, there is.

Q. Do you know when that agreement expires?

A. August 1, '74.

Q. Mr. Young, I would like to ask you if you have ever had a conversation with any management official in which the distribution of literature was a subject?

A. Yes, I have.

Q. Who was that conversation with?

A. Mr. Herbert J. George.

Q. And does he have an official capacity with the Company?

A. Yes.

Q. What is that capacity?

[12]

A. He is Assistant Personnel Director.

Q. And when did that conversation take place?

[13]

A. April 22nd, 10:00 o'clock.

Q. Would that be 1974?

A. That's correct.

Q. Could you tell the Judge as best you can recall what was said in that conversation?

A. I entered Mr. George's room—office, at approximately 10:00 o'clock, and I handed him a copy of a news lettter—

Q. If I can interrupt you at this time, Mr. Young. I show you a copy of an exhibit which has been marked as Joint Exhibit 1, and ask you to take a look at that and tell me if you have ever seen that before.

A. This is a copy of the news letter that I handed Mr. George.

Q. O. K., sir.

A. He looked at it very briefly and handed it back to me, and I told him that it was my understanding that he had refused, or the Company had refused permission to the Union to distribute this, and he said, "Yes, they had."

And I said—well, I was again asking permission for employees of the Company to be allowed to distribute this on non-working hours, on non-production areas, and specifically outside the clock alley; and if that area posed a problem, we would be willing to move to any area

[14]

convenient to the Company, out on the end of the walk

[15]

or guardhouse or parking lot, that we would only hand it out to employees leaving the plant, and where it wouldn't cause a litter problem in the plant.

And he said that we didn't have permission to do it. And so I asked him was this the Company's final position, and if so, was he refusing me permission to do it, and if he was, was that the Company's final position. And he said he would have to check with Mr. Menius. And he left the room very briefly, come back and said that it was the Company's final position, that they felt that we had access to the people through the U. S. Mail, and through union meetings.

He asked me at that time were we going to hand it out anyway, and I told him no, that we thought we had recourse through other channels, and we got up to leave, and he said, "Well, I guess I will see you in court."

Q. Mr. Young, you have testified that you made the request on behalf of employees of Eastex to pass it out in non-production areas in non-working time.

Are you sure you made the request in those words?

A. Yes, I am.

[15]

Q. How can you be sure you made the request that particular way?

A. Because permission had been denied to Hugh Terry, and he had reported to me.

Q. Who is Hugh Terry?

A. Hugh Terry is an employee of Eastex, and he holds an office with the Local Union which is vice-president, and he had reported to me, and I in turn called Mr.

[15]

Reeves Brunk, International Representative, and discussed it with him, and told him that the Union had been denied permission for employees to hand it out on non-production areas on non-working time.

And he questioned me very precisely on how did I know since I wasn't there, and told me to go back a second time and make sure that the Company understood our request and ask them again and get their position and make sure this was an official position of the Company and make sure that they understood that employees were going to hand it out, and they were going to do it in non-production areas on non-working time, and if it posed a problem in the area, explain to him that we would cooperate in any way, except we didn't think we—we were not going out on the highway, on public or state property, and that was the second meeting, and that's why—

[16]

Q. When did you have this conversation with Mr. Brunk?

A. It was either the latter part of March or early April, because there was probably a month from the time that Mr. Hugh Terry asked permission and the time I asked permission. And the date he asked, I am not sure of. I only know the date that I asked.

Q. And then at that point, after that conversation with Mr. Brunk, you went back and had the meeting with Mr. George?

A. That's correct.

Q. Mr. Young, can you tell the Court why you asked for permission to hand out this news bulletin?

[20]

A. Yes. We were going into negotiations, and it was something—we was trying to reorganize our group into a stronger group. We were trying to get members, people that were working there who were non-members, and try to motivate or strengthen the conviction of our members, and it was to organize a little.

Also, we had a good working relationship with the Company, and it had always been our policy and the Company's policy to approach each other with a request of any kind. They always tell us when they implement something new and discuss it with us, and it was a news bulletin, and we wanted to hand it out on their

[17]

property.

So we approach them, not that the contract said we had to or there was no rule said we had to, but it had just been the policy, and we felt it would continue our good relationship with the Company to handle it in this manner.

Q. Mr. Young, could you tell us how long you have been an employee with Eastex?

A. August 1 will be fourteen years.

* * *

[20]

* * *

Mr. Carrabba: I ask that you mark this as Joint

[21]

Exhibit 3.

(The document above-referred to was marked Joint Exhibit No. 3 for identification.)

Mr. Davis: I understand, your Honor, I will be furnished with a copy of this.

Judge Boyce: Yes.

Mr. Carrabba: Your Honor, Joint Exhibit 3 is a hand-drawn sketch of the plant premises, and I would offer it into evidence at this time so that any references made to the clock alley or to any other areas in the plant can be identified on the map, and hopefully would assist us and anyone who reviews the record.

Judge Boyce: Mr. Davis, any objections?

Mr. Davis: We have no objections to it, sir.

Judge Boyce: All right. Joint Exhibit 3 is received.

* * *

[22]

* * *

Q. (By Mr. Carrabba) Mr. Young, on this drawing, where it refers to Herb's office, whose office is that?

A. Herb George, Assistant Personnel Director.

Q. And the office adjacent to that, right next to that, is the—is labeled "Personnel Director."

Whose office is that?

A. Mr. Leonard Menius, Personnel Director.

Q. O. K. Now, a hallway which has been labeled on the document as Clock Alley, there are two boxes in here. Are those clocks at one end of the hall?

A. Time clocks.

Q. Time clocks, O. K. And is this the clock alley that you were referring to in your conversation with Mr. George, requesting permission be granted to pass out the union literature—I mean the news bulletin in that area?

A. That's correct.

* * *

[30]

* * *

Q. Mr. Young, when you had the conversation which you have detailed with Mr. Herbert George on April 22, nothing was said by you about the two rules in the current collective bargaining agreement, rules 14 and 15 on page 39; and nothing was said by him about those two rules; isn't that correct?

A. Absolutely correct.

* * *

[31]

* * *

Q. Now, you have told us that the collective bargaining agreement expires August 1, 1974.

[31]

A. That's correct.

Q. And the Union is presently in negotiation with the Company for a new agreement?

A. Correct.

[33]

* * *

Q. (By Mr. Davis) Now, I notice at the last page of your news bulletin—has something to do with the minimum wage—what is the minimum wage in the bargaining unit at the present time, and what was it on April 22nd, 1974, when you had your discussion with Mr. George?

Mr. Carrabba: Your Honor, I will object at this time. I don't see the relevance of this question either. I don't know what counsel is intending to prove by this line of questioning.

Judge Boyce: Could you tell me, Mr. Davis?

Mr. Davis: I am purporting to prove this, this news bulletin, in certain respects is purely a political bulletin dealing with things which would have no possible effect upon the employment relation at Eastex and dealing with matters which Eastex could not in any way control or influence or have anything to do with.

Now, as far as the first part where it says, "We need you," if they had asked just asked to distribute that and the last part, "food for thought," we would have had no objections. Our objection is to the other portions.

[68]

Judge Boyce: Overruled. I will permit that in the record.

* * *

[66]

* * *

HUGH TERRY

was called as a witness by and on behalf of the General Counsel and, having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

Q. (By Mr. Carrabba) Would you state your name and address for the record, please?

A. Hugh Terry, Route 2, Box 74, Buna, Texas.

Q. Mr. Terry, by whom are you employed?

A. Eastex, Incorporated.

[67]

Q. And how long have you been an employee of Eastex?

A. July 9th of this year was seventeen years.

* * *

[68]

* * *

Q. Mr. Terry, have you ever had any conversation

with a management official at Eastex in which the subject matter of distribution of a news bulletin was a subject?

A. Yes, I have.

Q. I show you what has been marked for identification as Joint Exhibit 1, and I would like you to take a look at it and ask you if you have ever seen that document before?

A. Yes, sir. This is the bulletin we were discussing.

Q. O. K. When was the first time that you discussed that document with a management official at Eastex?

A. March 26th, 1974.

Q. And who was that management official that you talked to?

A. Mr. Herb George.

Q. Do you know if he has any official capacity with the Company?

A. He is Assistant Personnel Director for Eastex, Incorporated.

Q. And where did this conversation take place?

A. In Mr. George's office.

Q. And can you tell the Judge as best you can recall what was said in that conversation?

A. Well, I entered Mr. George's office and spoke and handed him a copy of this news bulletin and told him that Boyd Young wanted me to come out and see if they would give us permission to hand out this news bulletin to the employees in the clock alley or either distribute it as an exhibit on a little table there, or something, where they could pick up a copy of it.

Mr. George took it, looked it over, read it, not in detail, but read over it and kind of jokingly, he said, "We can't let you hand out propaganda like that out here," but said, "I will find out about it."

So I left, and a few days later I don't know, three or four days, I went back by his office and asked him what the answer was on the distributing this, and he said, "The answer is no." And I says, "Well, all I can do is just tell Boyd what you said."

Q. O. K. What other conversations have you had with Mr. George concerning this news bulletin, if any?

A. Well, I was in a meeting on April 22nd when Mr. Young asked permission for the second time to hand out this news letter.

Q. Do you recall what was said in that conversation?

A. We were there on a grievance was the reason we were there initially, and after we had discussed this, well, Mr. Young taken a copy out of his briefcase and handed it to Mr. George and said, "I would like to talk about this while I am here, too."

And he took it and looked it over and told Boyd that they couldn't let us hand it out. And at this point, Boyd got rather serious and said, "Is this you all's final answer?" and Mr. George said, "Well, I don't know. I will have to check with Mr. Menius. We will see."

So he left the room briefly, came back in and said, "The answer is no."

* * *

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* * *

LEONARD C. MENIUS

was called as a witness by and on behalf of the Respondent and, having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

Q. (By Mr. Davis) State your name, please.

A. Leonard C. Menius.

Q. By whom are you employed and in what capacity are you employed, Mr. Menius?

A. By Eastex, Incorporated, as the Personnel Director.

Q. How long have you been so employed at Eastex?

A. Since February of 1954.

* * *

[92]

* * *

Q. Now, Mr. Menius, were you shown Joint Exhibit 1, the news bulletin, at some time before this case was filed against the Company?

A. Yes, I was.

Q. Did you advise Mr. George that passing that out would not be permitted on company property?

A. Yes. He came back into my office with it in his hand and he said, "Boyd wants to pass this out." So I looked at it and looked quickly through the first para-

graph and would have said sure at that point, then I got to the second and third paragraphs and said no.

Q. Why did you say no to the second and third paragraphs?

A. I didn't see any way in which that was related to our association with the Union.

[93]

Q. Looking at the first paragraph headed "We Need You," and the last one, "Food for Thought," in Joint Exhibit 1, if that had been the only thing in that, would there have been any objection to them either passing it out or posting it on the bulletin board?

A. No.

* * *

[96]

* * *

Q. (By Mr. Davis) Now, how long have you been in negotiations for the new labor agreement which I understand will become effective August 1, 1974, when you reach it?

Mr. Carrabba: Your Honor, I object. I don't know what relevance that question has. We have had similar questions before in that area.

Judge Boyce: Sustained.

Mr. Davis: I would like to make my offer of proof then.

[96]

Q. (By Mr. Davis) How long have those negotiations been going on?

A. We exchanged items, the Union and the Company, sometime in June. I don't remember the exact date and then began actual negotiations July 8th, this month.

* * *

[97]

* * *

HERBERT JAMES GEORGE

was called as a witness by and on behalf of the Respondent and, having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

Q. (By Mr. Davis) State your name, please.

[98]

A. Herbert J. George.

Q. By whom are you employed and where and in what capacity are you employed, Mr. George?

A. By Eastex, Incorporated, Silsbee, Texas, as Assistant Personnel Director.

Q. How long have you been so employed?

A. Since October of 1969.

* * *

[100]

[99]

* * *

Q. Now, will you tell me, please, the conversations which you had concerning Joint Exhibit No. 1, which is

[100]

the news bulletin that the Union wanted to distribute on company property?

A. The first conversation regarding that document was with Hugh Terry. He brought a copy of it into my office and said that—something to the effect that Boyd Young had asked him to find out if the Company would permit copies of this document to be distributed to employees.

He requested that—what he wanted to do was to set up—for us to set up a table in the clock alley with a stack of these copies on it so the employees could pick it up as they came and went to work.

He made reference at that point that normally they mailed this type of information to the employees, but with the increase in postal rates they felt they could save a little money by having it passed out in this fashion.

I looked at the document at that point and told him that I didn't know. I doubt that we would grant that request, but I would check it with higher management.

Q. Was there any more conversation other than that on the first occasion?

A. None that I recall.

Q. Can you fix the approximate date of that?

[101]

A. No, sir. They have testified to a date in April—excuse me—a date in March, and I would say that it was approximately around that time, but I am not sure exactly what the date was.

Q. All right. What was the next conversation you had pertaining to Joint Exhibit 1?

A. The next conversation would have been later that day or within a day or so. Boyd Young called on the telephone about something else, and in the course of the conversation he asked if Hugh Terry had brought by his letter.

And I said yes he had. And he said, "What did you think about it? Are you going to let us do this?"

And I said, "I really don't know at this point, but I will let you know as soon as I can give you an answer." That was the next conversation.

A few days later I did reply back to Hugh Terry that permission to place these copies in the clock alley was being denied.

You want me to continue on?

Q. Did you tell him why?

A. No, sir.

Q. All right. Continue on.

A. The next conversation about this particular document occurred in my office with Boyd Young. He asked

[102]

if it was still the Company's position that the Union could not pass these out on company premises, and I said yes.

He said, "You mean you would deny me the right to pass out literature like this to our membership?"

And I said, "Yes. We feel that you have other ways to communicate with your membership, and that that right is being denied."

And he said, "Well, we want to pass it out in the clock alley where people—they are not working—as they come and go to work."

And I said, "No, we can't let you do that."

And he said, "Well, can we pass it out on the walkway?" and I said, "No."

He said, "Can I pass it out in the parking lot?" and I said, "No." He said, "Are you sure that this is the Company's final position?" I said, "Yes. I am sure, but if you want me to doublecheck I would be glad to."

And he kind of indicated that he did so, so I got up and went into the other office where Mr. Menius was and I said that Boyd had asked again if he can pass out this letter that I showed you a few weeks ago, and I said, "The only difference this time is that rather than putting it on a table in the clock alley,

[103]

he wants to pass it out to the employees by hand. He wants me to doublecheck on the Company's position."

Mr. Menius said, "It's still our position that he can't do it."

And I went back into the office and told him that our position was unchanged.

* * *

SUPREME COURT OF THE UNITED STATES

No. 77-453

Eastex, Incorporated,
Petitioner,

v.

National Labor Relations Board

ORDER ALLOWING CERTIORARI. Filed January 23, 1978

The petition herein for a writ of certiorari to the United States Court of Appeals for the Fifth Circuit is granted.

No. 77-453

In the Supreme Court of the United States

OCTOBER TERM, 1977

EASTEX, INCORPORATED, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

WADE H. MCCREE, JR.,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

JOHN S. IRVING,
General Counsel,

JOHN E. HIGGINS, JR.,
Deputy General Counsel,

CARL L. TAYLOR,
Associate General Counsel,

NORTON J. COME,
Deputy Associate General Counsel,

LINDA SHER,
Assistant General Counsel,

DAVID S. FISHBACK,
Attorney,
National Labor Relations Board,
Washington, D.C. 20570.

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CITATIONS

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OCTOBER TERM, 1977

No. 77-453

EASTEX, INCORPORATED, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 26a-42a) is reported at 550 F. 2d 198; the decision of the court of appeals denying petitioner's motion for rehearing and motion for rehearing *en banc* (Pet. App. 44a-47a) is reported at 556 F. 2d 1280. The decision and order of the National Labor Relations Board (Pet. App. 4a-25a) are reported at 215 NLRB 271.

JURISDICTION

The judgment of the court of appeals (Pet. App. 43a) was entered on April 29, 1977. A timely petition for rehearing was denied on August 5, 1977 (Pet. App. 47a). The petition for a writ of certiorari was filed on September 22, 1977. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the National Labor Relations Board properly found that employee distribution of a union news bulletin which concerned, *inter alia*, a state right-to-work law and a federal minimum wage law, was concerted activity protected by Section 7 of the National Labor Relations Act, and that in the circumstances of this case the Company violated Section 8(a)(1) of the Act by prohibiting such distribution on non-working time in non-working areas.

STATUTE INVOLVED

Relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151 *et seq.*) are set forth at Pet. 3.

STATEMENT

1. In March and April of 1974, the Union[1] asked the Company for permission for employees to distribute a news bulletin from the local union president on non-working time in a non-working area (Pet. App. 13a). The news bulletin (Pet. App. 1a-3a) contained four sections:(1) an encouragement to members to take an active part in the union; (2) a discussion of a proposal to place a "right to work" provision in the proposed new state constitution and a suggestion that members write to their state representatives and senators opposing such a provision; (3) a criticism of President Nixon's veto of a minimum wage bill and a request that members not registered to vote do so because "[a]s working men and women we must defeat our enemies and elect our friends"; and (4) a statement further encouraging participation in the Union.

The Company denied permission to the Union to distribute its news bulletin, stating that the Union had "other ways to communicate with [its] membership" (Pet.

[1]United Paperworkers International Union, Local 801.

App. 14a). The Company gave no further explanation for its refusal to the employees, but explained at the hearing before the Board that it would not have objected to distribution of the first and fourth sections of the Union's bulletin, but that it denied permission to distribute the bulletin because the rest of the document, dealing with the state right-to-work law and the federal minimum wage, did not relate to the Company's "association with the Union" (Pet. App. 16a).

2. The Board found that the Company violated Section 8(a)(1) of the Act, 29 U.S.C. 158(a)(1), by prohibiting distribution of the news bulletin on its premises (Pet. App. 20a). The Administrative Law Judge (ALJ), whose decision was adopted by the Board, rejected the Company's contention that its prohibition was lawful because the minimum wage and right-to-work portions of the circular had no relation to the Company's association with the Union (Pet. App. 16a). The ALJ, pointing out that Section 7 of the Act, 29 U.S.C. 157, protects the rights of employees to engage in concerted activities not just for the purpose of collective bargaining but for "other mutual aid or protection" as well, concluded that the disputed portions of the circular fell well within those categories. Thus, regarding the second section of the bulletin, the ALJ explained that, "[u]nion security being central to the union concept of strength through solidarity, and being moreover a mandatory subject of bargaining in other than right-to-work states, it is plain that [the Union's 'commentary' on the proposed right-to-work provision for the state constitution] is 'pertinent to a matter which is encompassed by Section 7 of the Act' " (Pet. App. 17a). He further noted, regarding the third section, that the Union's statement on minimum wage proposals and "urging the election of legislators favorable to a higher minimum wage, also is pertinent in terms of Section 7, even though [the Company's] employees receive well over the sought-after minimum wage. The minimum

wage inevitably influences wage levels derived from collective bargaining, even those far above the minimum." (Pet. App. 18a.)

The court of appeals upheld the Board's decision and enforced its order (Pet. App. 27a).[2] The court stated (Pet. App. 33a):

> Eastex prohibited distribution of the bulletin because parts [2] and [3] were purely political and did not pertain to anything over which "Eastex had the authority or power to change or control." We do not accept Eastex's position. Both parts are sufficiently related to employment situations to merit §7 protection. * * *

In the court's view (Pet. App. 36a), "whatever is reasonably related to the employees' *jobs* or to their status or condition as employees in the plant may be the subject of such handouts as we treat of here * * *."

Applying this test to the material in issue, the court concluded (Pet. App. 39a-41a):

> One can hardly imagine a matter on which organized labor * * * has a more direct interest than right-to-work laws.* * *
>
> * * * * *
>
> Part [2] [of the bulletin] appeals to the workers with respect to circumstances that involve the effectiveness of the union as an institution. The

[2]The court of appeals rejected the Board's alternative argument that even if the disputed portions of the bulletin had been unprotected, the existence of protected material would have made the Company's prohibition unlawful (Pet. App. 18a, 41a-42a).

The Company did not challenge the finding by the Administrative Law Judge that it had maintained an unlawfully broad no-solicitation rule (Pet. App. 6a-9a).

> workers have a real interest in bringing to bear whatever political pressure they might have in order to affect conditions they perceive to be a threat or, vice versa, in their favor. It was within §7 protection.
>
> Although a bit more tenuous, we think part [3] "Politics and Inflation," is, likewise, protected. Clearly, a minimum wage law even in a company that has a minimum wage of $3.86 has a great deal of bearing, from an economic standpoint, on employment and wage levels. Minimum wage is a recurring item in annual negotiations between unions and employers. The national minimum wage may very well have a direct bearing on skilled labor beyond those covered under the minimum wage act. [Footnote omitted.]

The court denied the Company's petition for rehearing (Pet. App. 47a), but amended its decision to delete references to the First Amendment contained in its opinion, in conformance with the admonition in *Hudgens* v. *National Labor Relations Board*, 424 U.S. 507, to determine the content of Section 7 rights under statutory rather than constitutional principles (Pet. App. 45a-47a).

ARGUMENT

1. The court of appeals correctly upheld the Board's determination that the distribution of the bulletin by respondent's employees in non-working areas on non-working time was a "concerted activit[y] for the purpose of * * * mutual aid or protection" within the meaning of Section 7 of the Act, and that petitioner's prohibition of that activity violated Section 8(a)(1) of the Act.

The determination whether activities by employees on the employer's property are protected under the Act from employer restraint requires two inquiries. The first inquiry is

whether the activities bear a reasonable relation to those rights secured by the broad terms of Section 7, which provides, in pertinent part:

> Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection * * *.

If an activity is so related, the second inquiry is whether the employer's legitimate interests in production and work discipline justify a limitation on that activity in the circumstances. As this Court said in *Republic Aviation Corp.* v. *National Labor Relations Board*, 324 U.S. 793, 797-798, the Act represents "an adjustment between the undisputed right of self-organization assured to employees under the * * * Act and the equally undisputed right of employers to maintain discipline in their establishments." See also *Hudgens* v. *National Labor Relations Board*, 424 U.S. 507, 522; *National Labor Relations Board* v. *Magnavox Co.*, 415 U.S. 322, 324.[4]

Applying these principles to circumstances similar to those here, the Court in *Republic Aviation Corp.* v. *National Labor Relations Board, supra,* affirmed the well-settled rule that it is an unfair labor practice for an employer

[4]Petitioner errs in contending that the decision below is contrary to *Hudgens, supra; Central Hardware Co.* v. *National Labor Relations Board*, 407 U.S. 539; and *National Labor Relations Board* v. *Babcock & Wilcox Co.*, 351 U.S. 105. Those cases merely recognize that the exercise of Section 7 rights must be accommodated to the business interests and property rights of employers "with as little destruction of one as is consistent with the maintenance of the other." *National Labor Relations Board* v. *Babcock & Wilcox Co., supra*, 351 U.S. at 112. They did not define the scope of Section 7 rights.

to prohibit the distribution of union literature by employees on non-working time in non-working areas in the absence of special circumstances that justify a curtailment in the interests of production or discipline. Here, the petitioner did not assert any business related interest warranting its refusal to allow distribution of the bulletin by employees in non-working areas on non-working time, beyond its claim that two of the four paragraphs of the bulletin were not germane to its relationship to the Union or the employees. The court of appeals correctly held, however, that the right of employees "to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection" is not, as petitioner contends (Pet. 6), narrowly confined to "matters which are intimately connected to the employees' immediate employment or over which the employer has control."

Petitioner's narrow construction would effectively confine Section 7 activities largely to matters that would be the subject of bargaining between the employees and the employer, thereby ignoring the fact that Section 7 covers "activities for the purpose of collective bargaining [*i.e.*, with the employer] *or other mutual aid or protection*" (emphasis supplied). The broad purpose of the statute, as the court held, was to encompass "whatever is reasonably related to the employees' *jobs* or to their status or condition as employees in the plant * * *" (Pet. App. 36a). As petitioner notes (Pet. 6), that interpretation has been upheld by all courts of appeals that have directly considered the issue.[5] See *Kaiser Engineers* v. *National Labor Relations Board*, 538 F. 2d 1379, 1384-1385 (C.A. 9) (action of civil engineer

[5]Petitioner does not dispute the correctness of the court of appeals' conclusion that the two challenged paragraphs in the bulletin came within the terms of Section 7 as construed by the court. Petitioner disputes only the correctness of that construction.

in signing a letter to federal legislators opposing a competitor's application to immigration authorities for authorization to import foreign engineers was for "mutual aid or protection" within the meaning of Section 7; even though "the activity involved no request for action on the part of the company, did not concern a matter over which the company had direct control, and was outside the strict confines of the employment relationship," it was concerted activity which affected the employees' job security);[6] *Bethlehem Shipbuilding Corp.* v. *National Labor Relations Board*, 114 F. 2d 930, 937 (C.A. 1), certiorari denied, 312 U.S. 710 ("the right of employees * * * to engage in concerted activities, now guaranteed by Section 7 of the National Labor Relations Act, is not limited to direct collective bargaining with the employer, but extends to other activities for 'mutual aid or protection', including appearance of employees representatives before legislative committees"); cf. *National Labor Relations Board* v. *Peter Cailler Kohler Swiss Chocolates Co.*, 130 F. 2d 503, 506 (C.A. 2) ("a union may subsidize propaganda, distribute broadsides, support political movements, and in any other [lawful] way further its cause or that of others whom it wishes to win to its side").

2. Petitioner errs in contending (Pet. 7-9) that the decision below is in conflict with decisions of three other circuits. While there are *dicta* in some of the cases cited by

[6]Contrary to petitioner's assertion (Pet. 6 n. 4), *Kaiser* did not create a division of authority within the Ninth Circuit on this issue. In *Shelly & Anderson Furniture Mfg. Co.* v. *National Labor Relations Board*, 497 F. 2d 1200, 1203-1204 (C.A. 9), the issue was not whether the object of the employees' protest was protected, but rather whether the means employed (a 10-15 minute work stoppage) was proper. *National Labor Relations Board* v. *Tanner Motor Livery Ltd.*, 419 F. 2d 216, 218 (C.A. 9), likewise did not turn on whether the object of the protest was protected (the court conceded that it would be), but on whether the means used (picketing by individual employees without first securing union sanction) was protected.

petitioner that, taken out of context, would support petitioner's narrow construction of Section 7, they also contain language supporting a broader view, and the facts of each case are in any event quite different from those presented here. Thus, *National Labor Relations Board* v. *Bretz Fuel Co.*, 210 F. 2d 392, 398 (C.A. 4), involved a wildcat strike protesting a pending legislative proposal concerning coal mines, which was in breach of contract and was led by a person employed by the union to perform certain functions at the employer's mines. The court held that in the circumstances of an unauthorized strike, the employer's refusal to permit that non-employee to continue his functions at the mine did not violate Section 8(a)(1) and (3).

National Labor Relations Board v. *Leslie Metal Arts Co., Inc.*, 509 F. 2d 811 (C.A. 6), involved a work stoppage arising, in part, out of a purely personal quarrel between employees. Although the court said that a work stoppage "arising from purely personal quarrels unrelated to labor disputes with an employer" would not be protected by Section 7 and Section 8(a)(1), it nevertheless granted the Board's petition for enforcement on the ground that the walkout was in part in protest of the employer's failure to protect employees from physical violence from other employees. 509 F. 2d at 814.[7]

In *G & W Electric Specialty Co.* v. *National Labor Relations Board*, 360 F. 2d 873 (C.A. 7), the court held that the employer was entitled to discharge, after warning, an employee who circulated a petition relating to a dispute

[7]Moreover, the court's general statement that "[w]hen employee activity is directed at circumstances other than conditions of employment, it is outside the protection of Section 7" (509 F. 2d at 813) is not significantly different from the standard adopted by the court below.

among the officials of the employees' credit union. There was no union in the plant, and the credit union had been organized by the employees and was operated by them alone. Consistently with the rationale of the decision below, the court concluded that the discharged employee, in mobilizing support for his side of the dispute about the management of the credit union, was acting outside of any interest "*qua* employee," and apart from "the subject matter the Act is designed to embrace—labor-management relations." *Id.* at 876-877. Here, in contrast, the employee interests to which the challenged paragraphs of the bulletin pertain—their wages and right to union security—lie at the heart of the employment relation.

3. There is no basis for petitioner's claim (Pet. 12) that the test utilized here—*i.e.*, whether the activity is reasonably related to the employees' jobs or their employment conditions—is so broad as to be "almost meaningless." Both the Board and the court of appeals carefully explained why the disputed newsletter material bore on the employees' interest *qua* employees (*supra*, pp. 3-5). The Board's holding that the newsletter here was so related to legitimate employee interests does not mean that every political message which a union wishes to communicate to employees would be so related. The determination of the protected character of employee activity depends upon the "distinctive facts" of each case. *National Labor Relations Board* v. *Leece-Neville Co.*, 396 F. 2d 773, 774 (C.A. 5). The Board has simply held that, where, as here, the union addresses two employment-related subjects for employee political action, that communication is sufficiently germane to the employment relationship to be entitled to the Act's protection.[8]

---

[8]Nor is there any basis for petitioner's claim (Pet. 12-16) that a remand is necessary because the Board failed to engage in a balancing of the employees' Section 7 rights against the employer's business or property interests in the first instance. As noted (p. 7, *supra*), petitioner has asserted no business or property interests that would have been affected by the distribution of the bulletin.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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DECEMBER 1977.

DOJ-1977-12

NO. 77-453

IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

EASTEX, INCORPORATED,
Petitioner

v.

NATIONAL LABOR RELATIONS BOARD,
Respondent

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF FOR THE PETITIONER

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TABLE OF ABBREVIATIONS

1. "Pet. App. . . ." means page . . . of the Appendix contained in the Petition for a Writ of Certiorari.
2. "App. . . ." means page . . . of the Appendix designated by the parties.
3. "R. . . ." means page . . . of the record of the hearing before the Administrative Law Judge.

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---

BRIEF FOR THE PETITIONER

OPINIONS BELOW

The decision of the Administrative Law Judge of the National Labor Relations Board is reported at 215 NLRB 271 (Pet.App. 4a-23a). The decision and order of the National Labor Relations Board is reported at 215 NLRB 271 (Pet.App. 24a-25a). The opinion of the Fifth Circuit Court of Appeals is reported at 550 F.2d

198 (Pet.App. 26a-42a). The judgment of the Court of Appeals appears in the Petition Appendix at 43a. The decision of the Fifth Circuit denying Petitioner's motion for rehearing and motion for rehearing *en banc* is reported at 556 F.2d 1280 (Pet.App. 44a-47a).

JURISDICTION

The judgment of the Court of Appeals was entered on April 29, 1977 (Pet.App. 43a). A timely petition for rehearing was denied on August 5, 1977 (Pet.App. 47a). Mandate was stayed to and including September 23, 1977. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1) and Section 10(f) of the National Labor Relations Act, 29 U.S.C. § 160(f).

STATUTES INVOLVED

Section 7 of the National Labor Relations Act, 29 U.S.C. § 157, reads in pertinent part as follows:

> Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection. . .

Section 8(a)(1) of the National Labor Relations Act, 29 U.S.C. § 158(a)(1) reads as follows:

> It shall be an unfair labor practice for an employer—
>
> (1) to interfere with, restrain, or coerce employees in the exercise of rights guaranteed in § 157 of this title.

QUESTIONS PRESENTED

1. Whether the "mutual aid or protection" language of Section 7 of the National Labor Relations Act grants protection to distribution, by employees on their employer's property, of writings or other materials containing subject matter which is political in nature or is not closely related to the employees' immediate employment relationship?

2. Whether Section 7 grants protection to the distribution by employees on an employer's premises of any material having a subject matter "reasonably related" to the employees' jobs, status, or conditions as employees?

3. Whether the interference with an employer's property rights which results from application of the "reasonable relation" standard used by the court below is completely out of proportion to the nature and strength of the Section 7 rights to be protected?

4. Whether the "accommodation" and "balance" made by the Court of Appeals in applying its "reasonable relation" standard reflects an appropriate recognition of an employer's property rights?

5. Whether the initial "balancing and accommodation" of employees' Section 7 rights and employer private property rights should have been made by the National Labor Relations Board rather than by the Court of Appeals?

STATEMENT OF THE CASE

This is an action to review a final order of the National Labor Relations Board ("Board") wherein the Board determined that Eastex, Incorporated ("Eastex")

violated Section 8(a)(1) of the National Labor Relations Act, 29 U.S.C. § 158(a)(1) ("Act"), in prohibiting distribution by employees of a Union-sponsored circular on Eastex' premises.

This case arose out of a decision by the Personnel Director of Eastex denying permission to employee members of the United Paperworkers International Union, Local 801 ("Union"), to distribute a union circular on Eastex' plant premises because Sections 2 and 3 of the circular were considered to have no relevance to any matter concerning Eastex' relations with its employees, and were political in nature. Eastex had no objection to the distribution on plant premises of Sections 1 and 4 of the circular (The complete contents of the circular appear in the Appendix at pages 2-4). Section 2 of the circular, "A Phoney Label—right to work", consisted of an argument against inclusion by a Texas constitutional convention of a "right to work" provision in a proposed revised constitution.[1] Section 3 of the circular, "Politics and Inflation", contained criticism of then President Nixon for his veto of H.R. 7935, a minimum wage bill, and comments about oil industry profits.

As a result of Eastex' refusal to allow distribution of Sections 2 and 3, Union filed an unfair labor practice charge with the Board on May 2, 1974, alleging violation of the Act. An amended charge was filed on June 4, 1974. The Board issued a complaint on June 4, 1974, alleging violations of Section 8(a)(1) of the Act through Eastex' refusal to allow distribution of the circular and its retention of no-solicitation and no-posting rules.

1. Texas has been a "right to work" state continuously since 1947. See Tex. Rev. Civ. Stat. Ann. Art. 5154g, § 1.

An Administrative Law Judge held that prohibiting distribution of the entire circular on plant premises was a violation of Section 8(a)(1) of the Act (Pet.App. 4a-23a).[2] On December 4, 1974, a three-member panel of the Board rendered a decision and order affirming the rulings, findings and conclusions of the Administrative Law Judge, and adopted his recommended order (Pet. App. 24a-25a).

On Appeal under Section 10(f) of the Act, the court below affirmed.[3] The court held that the "mutual aid or protection" clause of Section 7 extends to cover distribution on plant premises of "whatever is reasonably related to the employees' *jobs* or to their status or condition as employees in the plant", and included Sections 2 and 3 of the Union circular within the compass of such protection. The court rejected Circuit authority from the Fourth, Sixth, Seventh and Ninth Circuits which more narrowly limits the scope of Section 7 protection. On petition for rehearing and petition for rehearing *en banc*, the court below deleted all references to the First Amendment which were contained in its original opinion. Rehearing was denied (Pet.App. 44a-47a).

SUMMARY OF ARGUMENT

The protection offered by the "other mutual aid or protection" clause of Section 7 of the National Labor

2. The Administrative Law Judge also found that Eastex maintained a no-solicitation rule in violation of § 8(a)(1) of the Act. Eastex does not challenge the Administrative Law Judge's order as to the rule, nor did this rule play any role in Eastex' decision to prohibit distribution of the union circular. The rule is not in issue here. A no-posting rule was upheld. If distribution of the circular was not protected, the presence or absence of a no-solicitation rule would have no effect.

3. Reported at 550 F.2d 198 (5th Cir. 1977) (Pet. App. 26a-42a).

Relations Act does not extend to activity engaged in on the employer's property which has, at best, only an indirect bearing on the relationship between the employer and his employees. Section 7 does not protect political or non-employment related activities of employees on their employer's private property.

Activity protected under the "other mutual aid or protection" clause of Section 7 should contain the following elements: (1) a specific dispute; (2) with the employer; (3) over an issue which the employer has the right or power to affect. The activity deemed "protected" by the National Labor Relations Board and the court below possessed none of these elements.

The court below adopted a Section 7 standard which would protect any activity "reasonably related to the employees *jobs*, or to their status or condition as employees". However, the "reasonable relation" standard, as adopted and applied by that court, is impermissibly broad and, in effect, meaningless. Legislative history indicates that the Act was designed to regulate only the relationship between an employer and its employees. Consequently, activity not having a significant or direct bearing to the employer-employee relationship is unprotected by Section 7 of the Act, and the employer may lawfully prohibit it on his private property.

Even if an activity is within the protected scope of Section 7, the nature and need for that activity must be balanced against the employer's private property rights, and an accommodation made, "with as little destruction of one as is consistent with the maintenance of the other." *Central Hardware Co. v. NLRB*, 407 U.S. 539; *NLRB v. Babcock & Wilcox Co.*, 351 U.S. 105. The

activity the Union sought to engage in here, the in-plant distribution of literature dealing with general economic and political matters, was not of such a nature or the result of such a need as to outweigh Eastex' property rights. *Hudgens v. NLRB*, 424 U.S. 507. This conclusion is reinforced by the reasonable alternative means of communication available to the Union for distribution off of Eastex' private property. *NLRB v. United Steelworkers*, 357 U.S. 357.

Finally, the court below erroneously undertook the initial balancing and accommodation process, a task which was required of, but omitted by, the Board. *Hudgens v. NLRB, supra.*

I. THE SCOPE OF SECTION 7 EXTENDS PROTECTION ONLY TO CONCERTED ACTIVITY WHICH IS CONNECTED TO THE EMPLOYEES' RELATIONSHIP TO THEIR IMMEDIATE EMPLOYER

A. The Activity Must Have A Significant Connection To The Relationship Between Employer and Employee In Order To Be Protected.

It is well settled that not all concerted activity is protected under Section 7. *NLRB v. Local 1229, IBEW*, 346 U.S. 464. *NLRB v. Fansteel Metallurgical Corp.*, 306 U.S. 240. But there is a sharp conflict among (and within) the Circuits as to the scope of activity protected by the "other mutual aid or protection" clause of Section 7.

A number of Circuit Courts of Appeals have attempted to define the outer parameters of the "other mutual aid or protection" clause of Section 7 of the National Labor Relations Act. The majority of the Circuit Courts have taken the same position as Eastex: activity is protected within the "other mutual aid or protection" clause only if it concerns matters significantly connected to the employees' employment relationship with their employer.[4] Other courts have given wider scope to the clause.[5] The Fifth Circuit held below that any matter "reasonably related to the employees' *jobs* or to their status or condition as employees in the plant may be the subject" of handouts distributed on the plant premises. 550 F.2d 198, 202 (Pet. App. 36a).

The facts of this case lend a starting point for an analysis of the issue. The Union here sought to distribute a "news bulletin" which contained four sections: (1)

4. See *NLRB v. Leslie Metal Arts Co., Inc.*, 509 F.2d 811, 813 (6th Cir. 1975), ("Protected activity must in some fashion involve employees' relations with their employer. * * *"); *Shelly & Anderson Furniture Mfg. Co. v. NLRB*, 497 F.2d 1200 (9th Cir. 1974), (Protected activity must seek a specific remedy for a work-related complaint or grievance); *NLRB v. Tanner Motor Livery Ltd.*, 419 F.2d 216 (9th Cir. 1969), (the mutual aid clause of Section 7 "protects concerted activities which have to do with terms and conditions of employment"); *G & W Electric Speciality Co. v. NLRB*, 360 F.2d 873 (7th Cir. 1966), (when the activity of the employee does not involve a request for any action on the part of the company or does not concern a matter over which the company has any control such action is not within the other mutual aid or protection of 29 U.S.C.A. § 157); *NLRB v. Bretz Fuel Co.*, 210 F.2d 392, 396 (4th Cir. 1954), ("Concerted activity is protected only where such activity is intimately connected with the employees' immediate employment").

5. *See NLRB v. Peter Cailler Kohler Swiss Chocolates Co.*, 130 F.2d 503 (2nd Cir. 1942); *Bethlehem Shipbuilding Corp. v. NLRB*, 114 F.2d 930 (1st Cir. 1940), cert. denied, 312 U.S. 710; *Kaiser Engineers v. NLRB*, 538 F.2d 1379 (9th Cir. 1976).

"We Need You"; (2) "A Phony Label—'right to work' "; (3) "Politics and Inflation"; and (4) "Food for Thought". Eastex had no objection to the distribution of Sections 1 and 4. However, Sections 2 and 3 were objectionable to Eastex, and distribution of the handout on its plant premises was not allowed.

Sections 2 and 3 were considered to have no relevance to any matter concerning Eastex' relations with its employees, but were correctly perceived as being political in nature. The Union had always previously used the mails for distribution of its political propaganda.

Section 2 of the handout (Pet. App. 1a-2a) requested the reader to write his state legislators opposing adoption of the existing Texas state "right to work" law into a proposed state constitution. The Texas Legislature at that time had designated itself as a constitutional convention.

Part of Section 3 of the handout, "Politics and Inflation" (Pet. App. 2a-3a), consisted of a broadside against then President Nixon's veto of a minimum wage bill. At that time the minimum wage was $1.60; the lowest hourly wage at Eastex was $3.68 (Pet. App. 15a, n. 10). Approximately one-half of Section 3 concerned the Union president's opinion on oil industry profits. Finally, the reader was asked to register to vote.

Sections 2 and 3 of the Union handout did not concern any issue affecting the employees of Eastex in their relationship with Eastex. Instead, the disputed sections sought to inform the reader about the author's view on matters of general public economic and political interest. Section 7 does not embrace or protect such activity.

Section 7 specifically protects both the right to bargain collectively and the right to engage in other concerted activities for "mutual aid or protection". But this language does not mean that employees have a license to do whatever they please so long as the activity is nominally concerted and is not unlawful. *NLRB v. Sands Mfg. Co.*, 306 U.S. 332. An activity, to be protected, must have as its purpose alteration of or effect on some aspect of the employment relationship. It is only in their role as "employees" that employees are present on the employer's premises, and it is only when acting in scope of that role that the Act affords them protection.

The extent of this protection was examined by the Fourth Circuit in *NLRB v. Bretz Fuel Co.*, 210 F.2d 392 (4th Cir. 1954), a case analogous to that at bar. In *Bretz Fuel*, the West Virginia Legislature was considering a "Fire Boss" bill which would allow mine foremen to inspect the mines for safety conditions before the start of each shift. This "Fire Boss" bill was "a legislative proposal affecting mine conditions". 210 F.2d at 393. The mine employees struck in opposition to the passage of the bill, and the court held their action to be unprotected activity. The rationale employed by the court is instructive. The court noted that the activity did not "have anything to do with either working conditions or relations between respondent and its employees." 210 F.2d at 397. The court also observed:

> But we think it equally clear that if these same employees had gone on strike to put pressure on Congress to pass a favorable change in the Fair Labor Standards Act, that would be political activity and not protected by the Act, which was designed to protect employees' rights more intimately connected with their immediate employment. We know of no case holding that a wildcat strike designed to put pressure upon the legislature, to pass legislation desired by the Union, is protected by the Act. 210 F.2d at 397.

In *Shelly & Anderson Furniture Mfg. Co. v. NLRB*, 497 F.2d 1200 (9th Cir. 1974), the Ninth Circuit adopted a four point test for determining protected activity under Section 7:

1) there must be a work-related complaint or grievance;
2) the concerted activity must further some group interest;
3) a specific remedy or result must be sought through such activity;
4) the activity should not be unlawful or otherwise improper. 497 F.2d at 1202-3.

The broadside at issue in the instant case wholly fails to satisfy the first or third elements of this test.

The Sixth Circuit adopted a similar rule in *NLRB v. Leslie Metal Arts Co.*, 509 F.2d 811 (6th Cir. 1975). That court held that protected activity must in some fashion involve the employees' relations with their employer, and thus constitute a manifestation of a "labor dispute". Section 2(9) of the Act defines "labor dispute" as " . . . any controversy concerning terms, tenure or conditions of employment."

The Seventh Circuit has expressly rejected the position of the Board and that of the court below. In *G & W Electric Specialty Co. v. NLRB*, 360 F.2d 873 (7th Cir. 1966), the court used a "significant connection to

the employment relation" test. In *G & W Electric* the employees had formed a credit union. The employer was not involved in the inception or administration of the credit union. An employee was discharged for passing around a petition addressed to the administrators of the credit union. The Board ordered the employee reinstated. The court refused to enforce the order, stating:

> The Board's decision expresses the view that the ambit of Section 7 is not confined to "activities which are immediately related to the employment relationship or working conditions, but extends to the type of indirectly-related activity" here involved and that the benefits available through membership in an employee credit union "are close enough in kind and character, and bear such a reasonable connection to matters affecting the interests of employees *qua* employees, as to come within the general reach of the 'mutual aid and protection' the statute is concerned to protect" . . .
>
> . . . Here the activity involved no request for any action upon the part of the Company and did not concern a matter over which the Company had control. It is true that the employee-members of the credit union had a legitimate concern in the proper administration of its affairs. But their interest, although mutual, was one arising from their status as borrowers or depositor-investors. It was not an interest derived from their status as Company employees or bearing any significant connection to their employment relationship with the Company . . .
>
> . . . The sweep of the broad interpretation inherent in the Board's application of the "or other mutual aid or protection" clause to the facts of the instant case gives to that clause a meaning and effect which in our opinion is out of harmony with the immediate context in which the clause appears and which transcends the subject matter the Act is designed to embrace—labor-management relations.
>
> The range of possible employee mutual interests apart from those which bear a reasonably significant impact upon working conditions or some material incident of the employment relationship is in our opinion a much broader field than Section 7 is designed to encompass.
>
> 360 F.2d at 876-77.

Each of these opinions places emphasis upon one decisive factor: the employee is only protected for activity within the scope of the employment relationship. Once the employee seeks to impose upon the employer as to matters which do not concern the employment relationship, Section 7 becomes inapplicable.

The National Labor Relations Act was enacted to regulate labor-management relations in order to promote industrial peace. Section 7 of the Act was designed to ensure employees' rights within the sphere of the employer-employee relation. Cf. *United Mine Workers of America v. Pennington*, 381 U.S. 657, 666.

The principle which emerges from the above-mentioned cases is that in order to be protected under the "other mutual aid or protection" clause, an activity should contain the following elements: (1) the existence of a specific dispute; (2) with the employer; (3) over an issue which the employer has the right or power to affect. The activity deemed by the Board and the Fifth Circuit to be "protected" possessed none of these attributes. It was unprotected.

B. The "Reasonable Relation" Standard As Adopted And Applied Below Is Too Broad.

The Fifth Circuit held that any matter "reasonably related to the employees' *jobs* or to their status or condition as employees" is protected by Section 7. 550 F.2d 198, 202 (Pet. App. 36a).

The view of the scope of Section 7 inherent in the Fifth Circuit's "reasonable relation" standard was touched upon in *NLRB v. Peter Cailler Kohler Swiss Chocolates Co.*, 130 F.2d 503 (2nd Cir. 1942). In this case some union members met off company premises and produced a resolution of "solidarity" with a farmers "union" engaged in a milk strike. As part of the resolution the employees determined "to register their protest to the management of this company on their action in regards to the 1939 strike of the Dairy Farmers Union . . .", and that a copy of the resolution be sent to the manager of the company. 130 F.2d at 505, n.1. Other copies were sent to the press and published. The court held the discharge of the union president interfered with the employees' Section 7 rights. *Peter Cailler Kohler*, however, is distinguishable. Unlike the instant case, in *Peter Cailler Kohler* there was a specific dispute with management, over action taken by management, and in an area where management had the power and right to act. Additionally, there was no property right involved (See *infra.*).

The Fifth Circuit expressly relied upon *Kaiser Engineers v. NLRB*, 538 F.2d 1379 (9th Cir. 1976). In *Kaiser* the employee-engineers met off the employer's premises and sent a letter to various congressmen objecting to the relaxation of immigration laws as they applied

to foreign engineers. One of the authors was discharged by Kaiser. The Ninth Circuit, in a split decision, held that concerted activity of lobbying legislators regarding policies which would affect their job security is within the protection of Section 7.[6] Kaiser is distinguishable in that the employees (a) met off the plant premises; (b) did not seek to distribute their material on plant property, and (c) sought a specific result on an issue of threatened job security. Circuit Judge Kennedy, in a strong dissent, expressed complete disagreement with the majority holding, citing *Shelly & Anderson Furniture Mfg. Co. v. NLRB*, 497 F.2d 1200, 1202-3 (9th Cir. 1976), and *G & W Electric Specialty Co. v. NLRB*, 360 F.2d 873, 876 (7th Cir. 1966).

Eastex submits that the "reasonable relation" standard is overly broad and meaningless. This view is underlined by the position taken by the Board in its Brief In Opposition to Eastex' Petition for A Writ of Certiorari. In discussing *NLRB v. Leslie Metal Arts Co.*, 509 F.2d 811 (6th Cir. 1975), the Board stated:

> Moreover, the court's general statement that "[W]hen employee activity is directed at circumstances other than conditions of employment, it is outside the protection of Section 7" (509 F.2d at 813) is not significantly different from the standard adopted by the Court below. (*Bd.* at 9, n.7)

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6. Although the court below relied upon *Kaiser Engineers v. NLRB*, 538 F.2d 1379 (9th Cir. 1976), *Kaiser* is itself in conflict with two other Ninth Circuit decisions: *Shelly & Anderson Furniture Mfg. Co. v. NLRB*, 497 F.2d 1200 (9th Cir. 1974), and *NLRB v. Tanner Motor Livery, Ltd.*, 419 F.2d 216 (9th Cir. 1969). *Kaiser* was a 2-1 decision authored by District Court Judge Sweigert which did not overrule such other decisions, and did not involve employer property rights. See 538 F.2d 1379, 1386-87 (Dissent of Kennedy, J.). We submit that the court in *Kaiser* was impliedly extending First Amendment protections to the discharged employee.

Eastex submits that there is a substantial difference between the "reasonable relation" standard as adopted and applied by the Fifth Circuit, and the standard adopted by the court in *Leslie*. In *Leslie* the Sixth Circuit held that "protected activity must in some fashion involve employees' relations with their employer and thus constitute a manifestation of a 'labor dispute' . . ." 509 F.2d at 813. *Leslie* also quoted with approval the "significant impact" standard of *G & W Electric, supra,* which expressly rejected the "reasonable relation" standard, and the Ninth Circuit's holding in *Shelly & Anderson, supra,* that there must be a work-related complaint or grievance. 509 F.2d at 813.

The application of the "reasonable relation standard" in the instant case also reinforces Eastex' assertion as to its excessive breadth and impracticability. None of the topics addressed in Sections 2 and 3 of the handouts concerned Eastex' relations with its employees. As admitted by the court below, only through a long series of indirect and unrelated political and economic events and circumstances could Eastex' relations with its employees be affected in any way by the issues addressed in Sections 2 and 3. In short, Eastex, and its "employees", were uninvolved.

In his posture as an Eastex employee, a reader of the handout had no involvement or relation to the issues addressed in Sections 2 and 3. As a citizen or consumer, each of the topics might be of importance. But the National Labor Relations Act was intended only to regulate the employment relationship. At the moment an employee sheds his status as an Eastex employee, and dons another mantle, that of citizen or consumer, the Act, and Section 7 in particular, becomes inapplicable.

The interpretation of Section 7 by the court below is so broad that any topic in union literature can be easily rationalized into a finding of "reasonable relation" to union or "generic" employee interests. Once this "reasonable relation" is found, the literature may be distributed on an employer's property although its relation to the employer is at best attenuated and, in fact, logically remote. The topics which could be addressed in handouts distributed under the "reasonable relation" standard are almost unlimited.

Controversies in the political sphere over such issues as common-situs picketing, the Equal Rights Amendment, illegal aliens, or welfare reform could all be addressed by union in-plant handouts under the holding of the Fifth Circuit. As examples, the Humphrey-Hawkins bill, if enacted, might well have the same general effect upon national employment as the Fifth Circuit ascribed to the minimum wage bill (550 F.2d at 205 [Pet. App. 41a]); and amendment of the National Labor Relations Act could more directly affect union strength than the proposed Texas "right to work" constitutional provision. Consequently, under the "reasonable relation" rule, an employer would interfere with his employees' Section 7 rights if he prohibited employees from distributing, on plant premises, broadsides supporting their positions on such bills.

Those seeking public elective office may well pursue actions or philosophies which have a reasonable relation" to the employees' "status or condition". Accordingly, the ruling of the Fifth Circuit would appear to allow distribution under Section 7 of literature endorsing such candidates. For example, during the 1976 Presidential

election campaign, President Carter endorsed the Humphrey-Hawkins bill, while then President Ford opposed it. Since the bill would seemingly have a "reasonable relation", an employee conceivably would have been permitted to distribute, on an employer's private property, literature which endorsed Mr. Carter and cited his stand on Humphrey-Hawkins.

Eastex submits that in practice the "reasonable relation" rule, as interpreted and applied below, is meaningless, and will allow distribution of material having no real bearing on the employer-employee relationship.

The term "employee" as defined in Section 2(3) of the Act should not be stretched beyond its plain meaning to encompass the generic, but should be limited, as Congress intended to limit it, to one who works for a specific employer for hire. See H.R. Rep. No. 245, 80th Cong., 1st Sess., 18 (1947).

In the past the Board itself has had occasion to affirm that, in order to be protected, the concerted activity involved should relate to "organizational matters" or be "germane to the employment relationship" between employees and their employer. *Jefferson Standard Broadcasting Co.*, 94 N.L.R.B. 1507, 1511-12, *aff'd sub nom. NLRB v. Local Union 1229, IBEW*, 346 U.S. 464. As was noted by this Court in that case:

> The handbills made no reference to the union, to a labor controversy, or to collective bargaining. . .
>
> Their attack related itself to no labor practice of the Company. It made no reference to wages, hours or working conditions. . . 346 U.S. at 468, 476.

The Act was construed in *Allied Chemical Workers v. Pittsburgh Plate Glass Co.*, 404 U.S. 157, as being designed only to regulate and protect the employee-employer relationship. Once that bond is legally broken, or where the subject does not significantly affect the employee-employer relationship, or the significant interests of the employees as employees of the employer, the Act is no longer applicable.

It is the Board's duty and function to regulate the employer-employee relationship. Where a union, or employees, seek to expand their interests beyond that employer-employee relationship into the sphere of the general "public weal", or into areas of social or political comment apart from any significant facet of the employment relationship, the protections granted in Section 7 do not attach. Cf. *Republic Steel Corp. v. NLRB*, 311 U.S. 7, 13. This is especially true when the activity is engaged in on the employer's property.

C. The Legislative History Of The Wagner Act Further Demonstrates That The Act Is Intended Only To Regulate Matters Within The Employment Relationship.

A review of the legislative history of the Wagner Act indicates clearly that Congress intended to regulate only the relationship between the employer and employee.

The opposition to the Wagner Act, which was at times almost hysterical, never focused upon the scope of protected concerted activity as it bears upon the employment relationship. On the contrary, it was assumed by all that the Act dealt with no more than the regulation of matters closely incident to the relationship between employer and employee.

As this Court has held repeatedly, "it is the sponsors that we look to when the meaning of statutory words is in doubt." *Schwegmann Bros. v. Calvert Distillers Corp.*, 341 U.S. 384, 394-95. A review of the statements made by the sponsors of the Wagner Act, especially those of Senators Wagner and Walsh, illuminates Congress' intent.

Senator Walsh was the chairman of the Senate Committee on Education and Labor, and he also served on the conference committee charged with reconciling the House and Senate versions of the bill, S. 1958. During debate on a proposed amendment to Section 7 by Senator Tydings, Senator Walsh explained the purpose of the bill:

> Mr. Walsh. . . . It makes absolutely no change whatever in the existing law, so far as the relation of employers and employees are concerned, excepting those limited respects that relate to collective bargaining and the right of employees to organize without interference by employers.
>
> . . . What does the pending bill do? It does two things: It seeks to make effective the right of the employee to organize and engage in collective bargaining . . . 79 Cong. Rec. 7658.
>
> The bill does provide the means and manner in which employees may approach their employers to discuss grievances and permit the Board to ascertain and certify the persons or organization favored by a majority of the employees to represent them in collective bargaining, when the question of that representation is in doubt or dispute. Beyond this the bill does not go.
>
> A crude illustration is this: The bill indicates the method and manner in which employees may organize, the method and manner of selecting their

> representatives or spokesmen, and leads them to the office door of their employer with legal authority to negotiate for their fellow employees. The bill does not go beyond the office door . . . 79 Cong. Rec. 7659.
>
> . . . There is practically no change whatever in the present conditions affecting employers and employees except to provide for the creation of the machinery without interference by employers to permit employees to choose representatives to go to their employers for the purpose of collective bargaining. 79 Cong. Rec. 7660.

In the same vein, the author of the bill, Senator Wagner, stated that:

> The whole philosophy of this legislation is to deal with the relationship between employees and employers. 79 Cong. Rec. 7670.

The statements made by other leading proponents of the bill during debate also make clear that the protective umbrella of Section 7 relates only to activities which concern the collective bargaining relationship between employer and employee. For instance, Senator Borah, a member of the conference committee, argued that:

> We are here dealing with the relation between employer and employee. . . . 79 Cong. Rec. 7650.
>
> Section 7 of bill deals only with collective bargaining. 79 Cong. Rec. 7656.

Other aspects of the legislative history of the Wagner Act lend further support to Eastex' view of the Act. Senate Report 573, 74th Cong., 1st Sess., 1935, by the Committee on Education and Labor, included the following statements in its analysis of the bill.

> Section 7 and 8. Rights of employees—Unfair labor practices. These sections are designed to establish and protect the basic rights incidental to the practice of collective bargaining . . . Neither the National Labor Relations Board nor the courts are given any blanket authority to prohibit whatever labor practices in their judgment are deemed to be unfair. (p. 9)

In discussing constitutionality, the Committee referred again to the "employer-employee" relationship.

> The Committee is convinced that this proposal keeps within the confines of the constitutional power of Congress. The two main questions involved are: (1) are the regulations of the employer-employee relationship herein contemplated within the boundaries of due process of law . . . *Ibid* p. 17.

The Report of the House Committee on Labor included findings and a declaration of policy which stated the objective of the bill.

> The Committee wishes to emphasize particularly the objective of the bill to remove certain important sources of industrial unrest engendered, first, by denial of the rights of employees to organize and by the refusal of employers to accept the procedure of collective bargaining, and second, by failure to adjust wages, hours, and working conditions traceable to the absence of processes fundamental to the friendly adjustment of such disputes. . . . By protecting the right of employees to organize and bargain collectively, and as a direct result by promoting just and appropriate practices for friendly adjustment, the bill eliminates the most important causes of unrest and strikes. . . . 74 Cong., 1st Sess., H. Rep. No. 1147, p. 18 (1935).

It was not Congress' intention to go beyond the regulation of the employer-employee relationship and the process of collective bargaining. Consequently, an activity, in order to be protected, must concern some aspect of the relationship between an employer and his employees. An activity is not protected if it can be considered to have only a speculative or remote connection to the employment relationship.

An analysis of the language of Section 7, although not clear, points toward the same result.

> Sec. 7. Employees shall have the right to self-organization, to form, join or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other[7] concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a)(3).

The words "or other mutual aid or protection" indicate that activity other than that required for collective bargaining of a contract is protected. But both the word "mutual" and the preceding words "collective bargaining"

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7. The word "other" was added by the Taft-Hartley Act, 61 Stat. 136 (1947). It appears to have been inserted as a compromise. The House version had inserted the phrase "in other concerted activities (not constituting unfair labor practices under Section 8(b), unlawful concerted activities, under Section 12, or violations of collective bargaining agreements,") immediately after "and to engage . . ." The Senate version had retained the original Wagner Act language of the clause. Consequently, no importance should be attached to this first use of the term "other." See, 1 Legislative History of the Labor-Management Relations Act of 1947, pp. 176, 536-37, 543.

refer back to "employees"—employees in the specific sense of one working for an identifiable entity for hire. The phrase "collective bargaining or . . ." indicates a direct bargaining relationship whereas "other mutual aid or protection" must refer to activities of a similar nature —employees acting in concert with, or on behalf of, their fellow employees on employment and matters of mutual concern.

Sections 2 and 3 of the Union handout did not in any way concern Eastex' relationship with its employees. The topics addressed in the handout might possibly be seen to have an indirect relation to employees as "workers of the world", but legislative history indicates that activity with such an attenuated relation to the employer and his employees is not to be protected. As this Court has repeatedly stated, "In expounding a statute, we must not be guided by a single sentence or member of a sentence, but look to the provisions of the whole law, and to its object and policy." *United States v. Boisdoré's Heirs,* 8 How. 113, 122. See also, *NLRB v. Lion Oil Co.,* 352 U.S. 282, 288.

D. Activity On An Employer's Premises Which Is Unrelated To The Employment Relationship Falls Outside Of The Protection Of Section 7.

It is a "commonplace", of course, that the First Amendment does not apply to private property which has not assumed a public character. *Central Hardware Co. v. NLRB,* 407 U.S. 539. Also, it has been held that considerations of speech on an employer's property must be viewed only under Section 7 of the Act rather than under the strictures of the First Amendment. *Hudgens v. NLRB,* 424 U.S. 507.

Consideration of the factual situation in this case in light of the reasoning utilized by this Court in *Lloyd Corp. v. Tanner,* 407 U.S. 551, is useful. In *Lloyd* this Court pointed toward the "unrelated nature" of the handbilling involved to any purpose for which the shopping center was built and being used. 407 U.S. at 564. First Amendment protections did not attach. Dissenting in *Amalgamated Food Employees Local 590 v. Logan Valley Plaza,* 391 U.S. 308, Mr. Justice White also noted the limited scope of that shopping center's invitation to the public. ". . . The public is invited to the premises but only in order to do business with those who maintain establishments there." 391 U.S. at 338.

Just as property does not lose its private character "merely because the public is generally invited to use it for designated purposes," (*Lloyd, supra* at 569) an employer's property does not lose its private character merely because a labor union is involved or certified. Just as the public is invited to a merchant's premises to do business, employees are allowed on an employer's premises to work. Cf. *NLRB v. Sands Mfg. Co.,* 306 U.S. 332. The employer's property is devoted to one purpose—work. The invitation to employees to enter the premises is limited to the accomplishment of that purpose. The relationship is not that of public entity to citizen, but is instead only one of employer to employee. The privileges and protections afforded both parties are limited by their respective roles in the employment relationship.

The direct relation to the purpose or use of the property required in *Lloyd* must also be required in situations involving Section 7 rights. Where an activity has no direct bearing on any aspect of the relationship between the employer and his employees, it is unprotected. Section

7 does not grant a license to employees or a union to use the employer's property as a forum to espouse non-work related views. An employer's property, unlike a public park, is not designed to be a meeting place for various political or social clubs or organizations to proselytize. The private nature of the property, and the purpose for which the property is dedicated prohibit such activity.

Sections 2 and 3 of the Union handout are an attempt by the Union to convert Eastex' property into a general forum for the airing of political, or non-work related views. Its distribution was not protected.[8]

II. EVEN IF AN ACTIVITY IS PROTECTED BY SECTION 7, THE NATURE AND STRENGTH OF THAT ACTIVITY MUST BE BALANCED AGAINST THE EMPLOYER'S PROPERTY RIGHTS AND AN ACCOMMODATION MADE, WITH MINIMAL INTERFERENCE TO SUCH PROPERTY RIGHTS

A. The Property Rights Of The Employer Must Be Considered.

If a determination is made that an activity is protected by Section 7, the focus of inquiry turns to a consideration of the employer's private property rights. Although the Act regulates the relationship between employer and employee, the employer does not relinquish his property rights merely because of such relationship. Instead, the employer's property rights must be considered

8. We submit that the question of accommodation (discussed *infra*) does not arise since as a matter of law the subject of the union handout does not fall within "other mutual aid or protection."

and balanced against the nature and strength of the Section 7 right asserted. *Hudgens v. NLRB,* 424 U.S. 507. But where, as here, the union activity involved is remote from the employer-employee relationship, the result is preordained. The balance must be struck in favor of the employer's property rights.

Naturally, there are conflicts between Section 7 rights and private property rights. It is the Board's duty to "balance the interests asserted and to seek a proper accommodation between the two." *Central Hardware Co. v. NLRB,* 407 U.S. at 543. *Hudgens* instructs that the "guiding principle" (*Central Hardware,* at 544) established by this Court under the Act is the accommodation of Section 7 rights and private property rights "with as little destruction of one as is consistent with the maintenance of the other." 424 U.S. at 522. The "locus of that accommodation . . . may fall at differing points along the spectrum depending on the nature and strength of the respective Section 7 rights and private property rights asserted in any given context." *Hudgens* at 522.

In three decisions this Court has been uniform in its emphasis upon minimal interference with the property rights of employers. *Hudgens, supra; Central Hardware, supra; NLRB v. Babcock & Wilcox Co.,* 351 U.S. 105. The principle of *Babcock* and *Central Hardware* requires a "yielding" of property rights which is *"temporary and minimal"* only after a balancing and accommodation has been made. 407 U.S. at 544. While both *Babcock* and *Central Hardware* involved organizational campaigns, this Court in *Hudgens* held that other union activities (there strike picketing) must also be accommodated to employer property rights in a manner that results in "minimal interference".

B. Eastex' Property Interest Outweighs The Attenuated Nature Of The Union Activity Involved Here.

The next inquiry must be directed toward the nature and strength of the protected activity, in order to balance and then seek an accommodation with private property rights. Interference with private property rights must "be temporary and minimal" so far as is possible.

The court below balanced the respective rights of the employer and employees erroneously. The effect of the "balance" reached by the court below will be to extend Section 7 protection to practically every conceivable subject of union concern, unless it is certain to cause disruption.

The holding of the Fifth Circuit that the subject matter of any distributed materials having a "reasonable relation" to the employees or their status or condition is protected is in error.[9] But, even if it were not, if the subject matter does not involve a request for any action on the part of the employer, or does not concern a matter over which the employer has any degree of control, the accommodation process necessarily requires the conclusion that distribution on the employer's property is unprotected. As was stated in *Hudgens,* supra:

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9. The standard adopted by the Fifth Circuit in the instant case, and the practical effects of the standard, establish and extend First Amendment parameters to Section 7. The original decision of the Fifth Circuit reflected this predisposition. On Eastex' motion for rehearing, the court below excised all reference to the First Amendment, but did not change the rationale of its original decision. 556 F.2d 1281-82 (Pet. App. 47a). The Fifth Circuit has made an end run around *Hudgens* and declared First Amendment and Section 7 protections co-extensive.

> What is "a proper accommodation" in any situation may largely depend upon the content and the context of the § 7 rights being asserted. The task of the Board and the reviewing courts under the Act, therefore, stands in conspicuous contrast to the duty of a court in applying the standards of the First Amendment, which requires "above all else" that expression must not be restricted by government "because of its message, its ideas, its subject matter, or its content." 424 U.S. at 521.

In the instant case, the issue for accommodation consideration is the subject matter of the handout the Union sought to distribute. There was no need for the Union to distribute this handout. Unlike a situation involving matters directly affecting the employees' relationship with their employer, here the Union gratuitously decided to discuss political and general economic topics through its handout. Sections 2 and 3 of the handout were unnecessary intrusions on the employer's property rights.

As a proper accommodation depends upon the content and context of the Section 7 rights asserted, in this situation, where the subject matter of the distribution involved matters in the general economic and political sphere, at best tenuously connected to the employees' jobs or relations with the employer, the employer's property rights must prevail as a matter of law. To hold otherwise would render the balancing and accommodation process an empty gesture.

The "balancing" done by the court below does not follow this Court's mandate in *Hudgens, supra,* at 522. Nor does it represent "minimal interference" with the employer's property rights. It represents a total disregard of those property rights.

C. Alternative Channels Of Communication Were Available To The Union For Distribution.

It is germane to any balancing and accommodation process to examine not only the nature and strength of the Section 7 rights involved, if any, but also to consider whether there were alternative channels available for the effective communication of the union message. *NLRB v. Babcock & Wilcox Co.*, 351 U.S. 105.

Here, the Union had always previously made use of the mails for distribution of its politically oriented messages (Pet. App. 13a, n.8). There is no dispute that Eastex had complied with every request by the Union for names and addresses of all employees (R. 47-48). There was no claim by the Union, nor evidence produced by the Board at the hearing, which indicated that it was not feasible for the Union to distribute its polemic outside the gates of the plant. The Union's only complaint was increased cost. Cf. *Republic Aviation Corp. v. NLRB*, 324 U.S. 793. In short, no attempt was made to show that the ability of the Union to carry its political and economic message to the employees was truly diminished. *NLRB v. United Steelworkers*, 357 U.S. 357, 363.[10]

Where the nature of the activity sought to be engaged in by the Union is, at best, distant to any relationship between the employer and its employees, the existence of alternative means of communication weights the balance against distribution on the employer's private property.

10. This is not a situation where there was any anti-union animus (App. 10, R. 16-17). The Union has been the certified bargaining representative for Eastex employees since the opening of the plant in 1954 (R. 79). Nor does this case involve an organizing campaign, where the union might conceivably have a greater need to reach employees with its message. *Republic Aviation, supra.*

III. THE COURT BELOW UNDERTOOK AN ADMINISTRATIVE BALANCING PROPERLY A FUNCTION OF THE BOARD

The decision of the court below is also erroneous in its failure to recognize and require an administrative balancing of employee Section 7 rights and employer private property rights.[11] As noted in the denial of rehearing, "Eastex claims no balancing process was invoked in any of the administrative or judicial decisions in the case". In answering this charge, the Fifth Circuit asserted that "While *we* did not specifically cite *Hudgens*, *we* did recognize and necessarily applied the balancing test".[12] (Emphasis added) The Fifth Circuit made no attempt to address the omission of the administrative agency, and impliedly affirmed the failure of the Board to balance.

It is clear that the duty to balance and accommodate employees' Section 7 rights with the employer's property rights rests with the Board, not the courts. This Court in *Hudgens* recently reiterated this requirement. ". . . In each generic situation, the primary responsibility for making this accommodation must rest with the Board in the first instance." 424 U.S. at 522. See also *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 169; *NLRB v. Metropolitan Life Ins. Co.*, 380 U.S. 438, 442-443; *Securities and Exchange Commission v. Chenery Corp. (I)*, 318 U.S. 80, 90.

11. Of course, had the Board or the Fifth Circuit properly found the Union's activity to be "unprotected", no balancing process would have been necessary.

12. Pet. App. 45a. Eastex asserts that the Fifth Circuit failed to conduct a meaningful balancing process. See discussion, *supra.*

The Administrative Law Judge did not focus upon or make any reference to Eastex' property rights. He found only that the two disputed sections of the distributed material were protected by Section 7 and totally ignored Eastex' property rights. The Board adopted the opinion in its entirety, adding nothing. The Administrative Law Judge and the Board failed to "articulate any rational connection between the facts found and the choice made." *FTC v. Sperry & Hutchinson Co.*, 405 U.S. 233, 249. *Burlington Truck Lines, supra* at 168. *Metropolitan Life Ins. Co., supra* at 443.

Since no balancing process is evident in the administrative opinion, at the least the Court of Appeals should have remanded the case to the Board for further consideration of the issue of accommodation. *FTC v. Sperry & Hutchinson Co.; Phelps Dodge Corp. v. NLRB*, 313 U.S. 177, 197. Instead, the court below asserted that it engaged in the original balancing process, thus superseding the function of the Board.[13]

The initial accommodation is the function of the Board. The duty of the Circuit Court is to review the determination of the Board, not to chart paths as yet untraveled by the Board. *Burlington Truck Lines, supra.*[14] Here, the Court of Appeals left the "narrow confines of law" and entered the "more spacious domain of policy" reserved for the Board. *Phelps Dodge Corp. v. NLRB*, 313

13. Decision on motion for rehearing, 556 F.2d at 1281 (Pet. App. 46a).

14. "For the courts to substitute their or counsel's discretion for that of the Commission is incompatible with the orderly functioning of the process of judicial review." *Burlington*, 371 U.S. at 169. See also *Securities and Exchange Commission v. Chenery Corp. (II)*, 332 U.S. 194, 196.

U.S. 177, 194. See also, *South Prairie Construction Co. v. Local 627, International Union of Operating Engineers*, 425 U.S. 800; *NLRB v. Food Store Employees*, 417 U.S. 1, 9.

Even if this case is remanded, it is important for this Court to establish guidelines for the Board and reviewing court to apply in the balancing and accommodating process. The Board's position, and the decision of the court below, indicate clearly that there is a need for greater explication of the interaction between Section 7 rights and the private property rights of the employer.

The Board should be given direction as to factors to consider during the balancing and accommodation process. Its deliberation should include a consideration of whether there is a need for the activity; the closeness of the activity involved to the immediate employment relationship (nature and strength); the availability of alternative channels of communication; and the extent and duration of interference with the employer's property rights. Without consideration of these factors, among others, the balancing and accommodation process is incomplete.

CONCLUSION

For the above stated reasons, Eastex submits that the decision of the court below enforcing the Board's decision was erroneous and should be reversed.

Respectfully,

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March, 1978

No. 77-453

In the Supreme Court of the United States

OCTOBER TERM, 1977

EASTEX, INCORPORATED, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 26a–42a) [1] is reported at 550 F. 2d 198. Its order modifying its opinion and denying petitioner's requests for rehearing and rehearing *en banc* (Pet. App. 44a–47a) is reported at 556 F. 2d 1280. The decision and order of the National Labor Relations Board (Pet. App. 4a–25a) are reported at 215 NLRB 271.

[1] "Pet. App." refers to the appendix to the petition. "App." refers to the separate appendix to the briefs.

JURISDICTION

The judgment of the court of appeals (Pet. App. 43a) was entered on August 29, 1977, and petitions for rehearing and rehearing *en banc* were denied on August 5, 1977 (Pet. App. 44a). The petition for a writ of certiorari was filed on September 22, 1977, and was granted on January 23, 1978 (App. 24). The jurisdiction of this Court rests upon 28 U.S.C. 1254(1).

STATUTE INVOLVED

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151 *et seq.*) are as follows:

> Sec. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a)(3).
>
> Sec. 8. (a). It shall be an unfair labor practice for an employer—
>
> (1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7; * * *

QUESTION PRESENTED

Whether the National Labor Relations Board properly found that employee distribution of a union news

bulletin which concerned, *inter alia,* a state right-to-work law and a federal minimum wage law, was concerted activity protected by Section 7 of the National Labor Relations Act, and that the Company violated Section 8(a)(1) of the Act by prohibiting such distribution on nonworking time in nonworking areas of the plant.

STATEMENT

1. The United Paperworkers International Union, Local 801 (the Union) has represented the production employees of petitioner (the Company) since 1954 (Pet. App. 6a). In March 1974, several months before negotiations were to begin for a new collective bargaining agreement (App. 20), the Union's executive board decided to distribute among the Company's employees the following handbill (Pet. App. 1a–3a; emphasis supplied):

> NEWS BULLETIN TO LOCAL 801 MEMBERS FROM BOYD YOUNG—PRESIDENT
>
> WE NEED YOU
>
> As a member, we need you to help build the Union through your support and understanding. Too often members become disinterested and look upon their Union as being something separate from themselves. Nothing could be further from the truth.
>
> This Union or any Union will only be as good as the members make it. The policies and practices of this Union are made by the membership—*the active membership.* If this Union

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has ever missed its target it may be because not enough members made their views known where the final decisions are made—The Union Meeting.

It would be impossible to satisfy everyone with the decisions that are made but the active member has the opportunity to bring the majority around to his way of thinking. This is how a democratic organization works and its the best system around.

Through participation you can make your voice felt not only in this Local but throughout the International Union.

A PHONY LABEL—"RIGHT TO WORK"

Wages are determined at the bargaining table and the stronger the Union, the better the opportunity for improvements. The "right to work" law is simply an attempt to weaken the strength of Unions. The misleading title of "right-to-work" cannot guarantee anyone a job. It simply weakens the negotiating power of Unions by outlawing provisions in contracts for Union shops, agency shops, and modified Union shops. These laws do not improve wages or working conditions but just protect free riders. Free riders are people who take all the benefits of Unions without paying dues. They ride on the dues that members pay to build an organization to protect their rights and improve their way of life. At this time there is a very well organized and financed attempt to place the "right to work" law in our new state constitution. This drive is supported and financed by big business, namely the National Right-To-

Work Committee and the National Chamber of Commerce. If their attempt is successful, it will more than pay for itself by weakening Unions and improving the edge business has at the bargaining table. States that have no "right-to-work" law consistently have higher wages and better working conditions. Texas is well known for its weak laws concerning the working class and the "right-to-work" law would only add insult to injury. If you fail to take action against the "right-to-work" law it may well show up in wages negotiated in the future. I urge every member to write their state congressman and senator in protest of the "right-to-work" law being incorporated into the state constitution. Write your state representative and state senator and let the delegate know how you feel.

POLITICS AND INFLATION

The Minimum Wage Bill, H.R. 7935, was vetoed by President Nixon. The President termed the bill as inflationary. The bill would raise the present $1.60 to $2.00 per hour for most covered workers.

It seems almost unbelievable that the President could term $2.00 per hour as inflationary and at the same time remain silent about oil companies profits ranging from 56% to 280%.

It also seems disturbing, that after the price of gasoline has increased to over 50 cents a gallon, that the fuel crisis is beginning to disappear. If the price of gasoline ever reaches 70 cents a gallon you probably couldn't find a closed filling station or empty pump in the Northern Hemisphere.

Congress is now proceeding with a second minimum wage bill that hopefully the President will sign into law. At $1.60 per hour you could work 40 hours a week, 52 weeks a year and never earn enough money to support a family.

As working men and women we must defeat our enemies and elect our friends. If you haven't registered to vote, please do so today.

FOOD FOR THOUGHT

In Union there is strength, justice, and moderation;

In disunion, nothing but an alternating humility and insolence.

COMING TOGETHER WAS A BEGINNING
STAYING TOGETHER IS PROGRESS
WORKING TOGETHER MEANS SUCCESS
THE PERSON WHO STANDS NEUTRAL,
STANDS FOR NOTHING!

The decision to distribute the handbill or "news bulletin" was made, according to Union president Boyd Young,[2] because:

> We were going into negotiations, and * * * we was trying to reorganize our group into a stronger group. We were trying to get members, people that were working there who were nonmembers, and trying to motivate or strengthen the conviction of our members, and it was to organize a little. [Pet. App. 14a, 38a; App. 11.]

[2] Young is a longtime employee of the Company, on leave of absence to serve as Union president (Pet. App. 14a, n. 9).

On March 26, Company employee Hugh Terry, a vice president of the Union, asked Company assistant personnel director Herbert George for permission "to hand out this news bulletin to the employees in the clock alley" or "to set up a table in the clock alley with a stack of * * * copies on it so the employees could pick it up as they came and went to work" (Pet. App. 13a; App. 16, 21).[3] Terry explained that the Union "normally * * * mailed this type of information to the employees, but with the increase in postal rates [the Union believed it] could save a little money by having it passed out in this fashion" (Pet. App. 13a; App. 21). George responded that he doubted the Company would allow the Union to "hand out propaganda like that" but promised to "check it with higher management" (Pet App. 13a; App. 17, 21). A few days later George informed Terry that the Company would not allow distribution of the handbill in the clock alley, but gave no reason for the denial (Pet. App. 13a; App. 17, 22).

On April 22, Union president Young, accompanied by Terry and another employee, met with George and again requested permission for employees[4] to distribute the handbill. Young stated that, if the clock

[3] The clock alley is a passageway six to seven feet wide and is physically discrete from the production areas of the plant. It contains the timeclocks, as well as vending machines, a bulletin board, and chairs for people waiting to transact business in the administrative offices which flank the area. (Pet. App. 13a, n. 7; App. 4, 12–13.)

[4] The Administrative Law Judge credited Young's testimony that his request was couched in terms of employees (Pet. App. 14a, n. 9).

alley "posed a problem, we would be willing to move to any area convenient to the Company, out on the end of the walk or guardhouse or parking lot, that we would only hand it out to employees leaving the plant, and where it wouldn't cause a litter problem in the plant" (Pet. App. 13a–14a; App. 8–9, 23). After conferring with Company personnel director Leonard Menius, George reiterated the Company's refusal to permit distribution, stating only that the Union had other ways to communicate with its members (Pet. App. 14a; App. 9, 23).

The Union filed an unfair labor practice charge with the Board. At the Board hearing, Company personnel director Menius stated that he would not have objected to distribution of the first and fourth sections of the Union's handbill, but denied permission to distribute the handbill because the rest of the document, dealing with the state right-to-work law and the federal minimum wage, did not relate to the Company's "association with the Union" (Pet. App. 16a; App. 18–19).

2. The Board, adopting the decision of its Administrative Law Judge, found that the Company violated Section 8(a)(1) of the Act by prohibiting distribution of the handbill on the employees non-working time in non-working areas of the plant (Pet. App. 24a, 20a).[5] Following prior decisions, the Board construed

[5] The Board also found that the Company violated Section 8(a)(1) of the Act by maintaining a rule barring union and related solicitation by employees during non-working time (Pet. App. 20a). The Company did not challenge that finding below (Pet. App. 31a, n. 3) and it is not at issue here.

Section 7 of the Act as protecting not only activities "'directly and immediately involving the employment relationship,'" but also those which are "'pertinent to a matter which is encompassed by section 7'" (Pet. App. 16a). Applying this principle, the Board concluded that the handbill fell well within Section 7's protection.

Thus, regarding the second section of the handbill, the Board stated: "Union security being central to the union concept of strength through solidarity, and being moreover a mandatory subject of bargaining in other than right-to-work states, it is plain that [the Union's] commentary [on incorporating a right-to-work provision in the state constitution] is 'pertinent to a matter which is encompassed by Section 7 of the Act'" (Pet. App. 17a). And, regarding the third section, dealing with the veto of the federal minimum wage law and urging the election of legislators favorable to a higher minimum wage, the Board concluded that it "also is pertinent in terms of Section 7, even though [the Company's] employees receive well over the sought-after minimum wage. The minimum wage inevitably influences wage levels derived from collective bargaining, even those far above the minimum." (Pet. App. 18a.)

Finally, the Board held that, even if the Company were correct that "only portions of the circular bore Section 7 pertinence," it would not have been justified in denying its distribution. As the Board had previously ruled, an employer is not justified in prohibit-

ing the distribution of protected union literature merely because a portion of it may constitute extraneous "social comment." (Pet. App. 18a.)

The Board ordered the Company, *inter alia,* to cease and desist from "[p]rohibiting employees from distributing literature on nonworking time in nonworking areas concerning matters relating to the exercise of their Section 7 rights" (Pet. App. 21a).

3. The court of appeals upheld the Board's decision and enforced its order (Pet. App. 26a–42a).[6] The court held (Pet. App. 36a; emphasis in original) that "whatever is reasonably related to the employees' *jobs* or to their status or condition as employees in the plant may be the subject of such handouts as we treat of here * * *." The court concluded that the material in question satisfied this test (Pet. App. 39a–41a):

> One can hardly imagine a matter on which organized labor * * * has a more direct interest than right-to-work laws. * * *
>
> * * * * *
>
> Part [2] [of the bulletin] appeals to the workers with respect to circumstances that involve the effectiveness of the union as an institution. The workers have a real interest in bringing to bear whatever political pressure they might have in order to affect conditions they perceive to be a threat or, vice versa, in their favor. It was within § 7 protection.

[6] The court of appeals, however, rejected the Board's alternative holding that, even if the disputed portions of the bulletin had been unprotected, the Company's ban on the distribution of the circular would still have been unlawful (Pet. App. 41a–42a).

> Although a bit more tenuous, we think part [3] "Politics and Inflation," is, likewise, protected. Clearly, a minimum wage law even in a company that has a minimum wage of $3.86 has a great deal of bearing, from an economic standpoint, on employment and wage levels. Minimum wage is a recurring item in annual negotiations between unions and employers. The national minimum wage may very well have a direct bearing on skilled labor beyond those covered under the minimum wage act. [Footnote omitted.][7]

SUMMARY OF ARGUMENT

A

1. Petitioner's principal contention in this case is that Section 7 of the National Labor Relations Act covers only activities that are related to a specific dispute between employees and their immediate employer over matters that the employer has the right or power to control, and therefore that Section 7 does not cover the distribution of the news bulletin in this case because two of the four paragraphs of the bulletin did not pertain to a dispute over matters that petitioner had the right or power to affect. If petitioner's claim that Section 7 does not cover the distribution of the news bulletin were correct, nothing in

[7] The court denied the Company's petition for rehearing, but amended its decision to delete references to the First Amendment contained in its opinion, in conformance with the admonition in *Hudgens* v. *National Labor Relations Board*, 424 U.S. 507, to determine the content of Section 7 rights under statutory rather than constitutional principles (Pet. App. 45a–47a).

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the Act would restrain an employer from taking retaliatory action, including discharge, against employees involved in distributing such circulars, either on or off the employer's premises.

Petitioner's narrow construction is contrary to the language of Section 7, its history and the decisions of the Board and the courts construing it. It is contrary to the language of Section 7 because specific employee-employer disputes over matters within the employer's direct power to affect would almost always be the subject of mandatory collective bargaining over the terms and conditions of employment under the obligation imposed by Sections 9(a) and 8(a)(5) and (3). By its terms, however, Section 7 protects the rights of employees, *inter alia*, to "engage in other concerted activities for the purpose of collective bargaining *or other mutual aid or protection.*" (Emphasis supplied.)

Moreover, the history of Section 7 demonstrates that the very purpose of including the "other mutual aid or protection" clause in the statute was to provide protection to employees for concerted activities related to their interests and status as employees which go beyond seeking a specific objective from their immediate employer. Accordingly, the Board and the courts have consistently construed and applied Section 7 as including more than activities related to matters over which the employer has direct control, including, for example, activities by employees for the purpose of showing solidarity and support for the employees of other employers. Indeed, petitioner's narrow construction of Section 7 was recently rejected in *National Labor Relations Board* v. *Magnavox Co.*, 415 U.S. 322, in which the Court held that Section 7 protects the distribution of literature by employees on the employer's property seeking to persuade other employees to reject their union representative, although such matters do not involve a dispute with the employer and the employer has no right or power to affect them.

Thus, the court of appeals correctly rejected petitioner's construction of Section 7 and adopted and applied a standard that is certainly within the compass of Section 7. Indeed, the history of Section 7 and the authorities construing it suggest that the court of appeals' standard focuses too narrowly and exclusively on matters that affect the particular jobs of the employees in the plant. The court's standard, however, correctly reflects the principle that activities covered by Section 7 are not limited to employee-employer disputes on matters that the employer has the power to affect, and also the principle that Section 7 applies comprehensively to all matters that reasonably relate to employees in their status as employees.

2. The distribution of the union news bulletin was an activity covered by Section 7. Sections 1 and 4 of the bulletin, advocating support for the Union and the principles of collective action, were clearly covered by Section 7 and petitioner has never suggested otherwise. Sections 2 and 3 of the bulletin were related to and amplified the theme of Sections 1 and 4, by urging concerted action with respect to legislative

changes affecting union security (the Texas right-to-work laws) and minimum wage laws. As the court of appeals recognized, those changes had substantial impact on the employees' jobs and on their status as Section 7 and cases construing it, those changes were also of legitimate concern to petitioner's employees by virtue of their effect on other employees for whose "mutual aid or protection" petitioner's employees are entitled to engage in concerted activity.

employees in the plant. In light of the history of

If, as we contend, the distribution of the news bulletin was a right covered by Section 7, then the cases establish that it may be appropriate to accommodate the exercise of that right to the employer's property interests. Petitioner errs, however, in contending that its property interests justified its blanket prohibition of the distribution of the bulletin by employees on non-working time in non-working areas. Decisions of the Board and this Court have established that an employer may not ban the distribution of protected employee literature by employees on non-working time in non-working areas in the absence of a showing of "special circumstances" pertaining to production and plant discipline justifying such a ban. Petitioner has shown no circumstances justifying its blanket prohibition, and instead has relied entirely on its naked property interest and on its claim that the distribution of the news bulletin was not protected by Section 7 be-

cause of its subject matter. In those circumstances, there was no occasion for the Board to engage in a balancing of the employer's interests against the Section 7 rights of the employees.

C

As an alternative ground for its decision, the Board held that, even if Sections 2 and 3 of the bulletin did not involve matters within the scope of Section 7, petitioner was not justified in prohibiting its distribution in light of those portions of the bulletin that were concededly within the scope of Section 7. The court of appeals erroneously rejected that alternative ground for decision and misconceived the Board's holding. The Board did not hold or suggest that the inclusion, however insignificant, of protected material in otherwise unprotected material would protect the distribution of the literature as a whole. Rather the Board's holding, as reflected by the context of this case and the cases on which it relied, was that Section 7 protects the distribution of literature if it is in substantial part devoted to matters within the scope of Section 7, even though it also contains unprotected social or political comment. We submit that that position is correct and provides an alternative basis for affirming the judgment below. Otherwise an employer would be able substantially to undermine the protection of Section 7 by prohibiting distributions if its scrutiny of the literature revealed any extraneous social comments within it.

ARGUMENT

THE BOARD PROPERLY CONCLUDED THAT THE EMPLOYER VIOLATED SECTION 8(a)(1) OF THE ACT BY PROHIBITING EMPLOYEE DISTRIBUTION OF THE UNION NEWS BULLETIN ON NON-WORKING TIME IN NON-WORKING AREAS OF THE PLANT

A. DISTRIBUTION OF THE UNION NEWS BULLETIN WAS AN ACTIVITY PROTECTED BY SECTION 7

Section 7 of the National Labor Relations Act guarantees to employees:

> [t]he right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection.

Section 8(a)(1) of the Act implements this guarantee by making it an unfair labor practice for an employer to "interfere with, restrain, or coerce employees" in the exercise of their Section 7 rights.

The determination of whether activities by employees on the employer's property are protected under the Act from employer restraint requires two inquiries. The first inquiry is whether the activities come within the broad terms of Section 7, set forth above. The second inquiry is whether, if the activity is within the scope of Section 7, the employer's legitimate interests in production and work discipline justify its limitation of that activity under the circumstances. See *Republic Aviation Corp.* v. *National Labor Relations Board*, 324 U.S. 793, 797–798. See also *Hudgens* v. *National Labor Relations Board*, 424 U.S. 507, 522; *National Labor Relations Board* v. *Magnavox Co.*, 415 U.S. 322, 344.

The principal issue in this case involves the first inquiry—whether distribution by employees of the circular in question was an activity within the scope of Section 7. We address this question in this point A of the Argument, and address the second inquiry in point B, *infra*, pp. 36–39.[8]

1. *Activity is within the scope of Section 7 if it is reasonably related to the employees' interest and status as employees*

The court of appeals held that Section 7 encompasses employee distribution of literature concerning matters that are "reasonably related to the employees' *jobs* or to their status or condition as employees in the plant * * *" (Pet. App. 36a). It is difficult to see

[8] The distinction between these issues is important because if a particular activity is not protected by Section 7 at all, then nothing in the Act restrains the employer from taking retaliatory action with respect to that activity, whether it is undertaken on the employer's premises or not. If, for example, the distribution of the circular involved in this case were determined to be an activity not covered by Section 7, then nothing in the Act would prohibit the employer from discharging employees involved in its distribution either inside or outside the employer's property (although the employees may have contractual rights limiting the grounds for employer discipline or discharge). If, on the other hand, distribution of the circular is within the scope of Section 7, then the cases establish that it may be appropriate to balance the employees' need to exercise that right on the employer's premises against the employer's property interests in production or plant discipline to determine whether particular limitations on that activity are warranted under the circumstances.

on the face of it any substantial difference in petitioner's general formulation of the standard—that is, that "[t]he activity must have a significant connection to the relationship between employer and employee in order to be protected" (Br. 7, see also Br. 19). The difference between petitioner's proposed standard and the court's appears, however, from petitioner's *explanation* of its standard. Petitioner states (Br. 13) that in order to be protected by Section 7 an activity should contain the following elements:

> (1) the existence of a specific dispute; (2) with the employer; (3) over an issue which the employer has the right or power to affect.

As thus explained, petitioner's contention is contrary to the language and purpose of Section 7 and to the cases construing and applying it.

Petitioner's contention is contrary to the language of Section 7 because matters that contain the three elements identified by petitioner would almost always be the subject of mandatory collective bargaining concerning terms and conditions of employment under the obligation imposed by Sections 9(a) and 8(a)(5) and (3) of the Act, 29 U.S.C. 159(a), 159(a)(5), and (3). See, *e.g.*, *Fibreboard Paper Products Corp.* v. *National Labor Relations Board*, 379 U.S. 203, 211. By its terms, however, Section 7 encompasses more than activities directed to collective bargaining; it guarantees employees the right, *inter alia*, "to engage in other concerted activities for the purpose of collective bargaining *or other mutual aid or protection*" (emphasis supplied). Petitioner's position that Section

7 is limited to matters involving specific employee disputes with their own employer and matters within the employer's control would largely read the "other mutual aid or protection" clause out of the statute.

Moreover, that position is contrary to the history of Section 7, which shows that the principal purpose of that section was to provide employees with the protection of federal law for activities that go beyond those seeking a specific objective from the employee's own employer in the context of a specific dispute with that employer.

Section 7 derives from the Norris-LaGuardia Act, 47 Stat. 70, which was enacted in 1932 to limit the jurisdiction of federal courts to issue injunctions in labor disputes. Prior to that Act, most courts treated the concerted action of employees in labor matters as a tortious and enjoinable conspiracy unless the employees were directly employed by the employer affected and sought an objective which, in the court's judgment, had a direct relation to the benefits they were seeking to attain.[9] The Norris-LaGuardia Act sought to eliminate these subjective judgments by withdrawing federal jurisdiction to enjoin certain activities arising "out of any labor dispute" (now 29 U.S.C. 104), and by defining "labor dispute" in Section 13(c) to include "any controversy concerning terms or conditions of employment, or concerning the association or representation of persons in * * * seeking to arrange terms or conditions of employment,

[9] See Frankfurter and Greene, *The Labor Injunction* 26–29 (1930); *Duplex Printing Press Co.* v. *Deering*, 254 U.S. 443.

regardless of whether or not the disputants stand in the proximate relation of employer or employee" (now 29 U.S.C. 113(c)).[10] It also declared in Section 2 that it is the public policy of the United States that a worker (now 29 U.S.C. 102)

> have full freedom of association, self-organization, and designation of representatives of his own choosing, to negotiate the terms and conditions of his employment, and that he shall be free from the interference, restraint, or coercion of employers of labor, or their agents, in the designation of such representatives or in self-organization or in other concerted activities for the purpose of collective bargaining or other mutual aid or protection * * *.[11]

In language virtually identical to Section 2 of the Norris-LaGuardia Act, Section 7 of the Wagner Act provided that:

> Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in concerted activities, for the purpose of collective bargaining or other mutual aid or protection.

[10] See Frankfurter and Greene, *supra*, at 216–217.

[11] The Senate Report on the bill, which was ultimately enacted, stated (S. Rep. No. 163, 72d Cong., 1st Sess. 9 (1932)): [W]age earners [have the right] to organize and to act jointly in questions affecting wages, conditions of labor, and the *welfare of labor generally*."

Moreover, like Section 13(c) of the Norris-La Guardia Act, Section 2(9) of the Wagner Act defined the term "labor dispute" to include cases where the disputants do not stand in the proximate relation of employer and employee (now 29 U.S.C. 152(9)),[12] and Section 2(3) of the Wagner Act provided that the term "employee" shall "include any employee, and shall not be limited to the employees of a particular employer, unless the Act explicity states otherwise * * *" (now 29 U.S.C. 152(3)).[13]

As this Court stated in *Phelps Dodge Corp.* v. *National Labor Relations Board,* 313 U.S. 177, 191–192:

> The policy which [Congress] expressed in defining "employee" both affirmatively and negatively, as it did in § 2(3), had behind it important practical and judicial experience. "The term 'employee,'" the section reads, "shall include any employee, and shall not be limited to the employees of a particular em-

[12] As stated in S. Rep. No. 573, 74th Cong., 1st Sess. 7 (1935): "[U]nfair labor practices may, by provoking a sympathetic strike for example, create a dispute affecting commerce between an employer and employees between whom there is no proximate relationship. Liberal courts and Congress have already recognized that employers and employees not in proximate relationship may be drawn into common controversies by economic forces. There is no reason why this bill should adopt a narrower view, or prevent action by the Government when such controversy occurs." See also H.R. Rep. No. 1147, 74th Cong., 1st Sess. 9–10 (1935).

[13] This definition, which has been carried over to the present Act, negates petitioner's contention (Br. 18) that Congress intended to limit the term "employee" "to one who works for a specific employer for hire."

> ployer, unless the Act explicitly states otherwise. * * *" This was not fortuitous phrasing. It had reference to the controversies engendered by constructions placed upon the Clayton Act and kindred state legislation in relation to the functions of workers' organizations and the desire not to repeat those controversies. * * * The broad definition of "employ," "unless the Act explicitly states otherwise," as well as the definition of "labor dispute" in §2(9), expressed the conviction of Congress "that disputes may arise regardless of whether the disputants stand in the proximate relation of employer and employee, and that self-organization of employees may extend beyond a single plant or employer." H.R. Rep. No. 1147, 74th Cong., 1st Sess., p. 9; see also S. Rep. No. 573, 74th Cong., 1st Sess., pp. 6, 7.

Consistently with this background, Section 7 was early interpreted to protect concerted activity which did not immediately concern the conditions of employment of the employees engaged in that activity. Thus, in *Fort Wayne Corrugated Paper Co.* v. *National Labor Relations Board,* 111 F. 2d 869 (C.A. 7), the court upheld the Board's position that an employer could not threaten an employee with discharge for engaging in union activity on behalf of employees of one of its customers. The court stated (*id.* at 874):

> The Wagner Act will not be construed to have so narrow a scope as to protect union activities only in the interrelation between the employees and employer of one company. Unionism on a national scope is too well a recognized fact to confine legal protection solely to intracompany relations.

And in *National Labor Relations Board* v. *Peter Cailler Kohler Swiss Chocolate Company,* 130 F. 2d 503 (C.A. 2), an employee resolution published in the newspapers supporting a "milk strike" called by a dairy farmers' union was held protected by Section 7, even though the dairy farmers were not covered by the Act. As the court, speaking through Judge Learned Hand, stated (*id.* at 505–506):

> When all the other workmen in a shop make common cause with a fellow workman over his separate grievance, and go out on strike in his support, they engage in a "concerted activity" for "mutual aid or protection," although the aggrieved workman is the only one of them who has any immediate stake in the outcome. The rest know that by their action each one of them assures himself, in case his turn ever comes, of the support of the one whom they are all then helping; and the solidarity so established is "mutual aid" in the most literal sense, as nobody doubts. So too of those engaging in a "sympathetic strike," or secondary boycott; the immediate quarrel does not itself concern them, but by extending the number of those who will make the enemy of one the enemy of all, the power of each is vastly increased. It is one thing how far a community should allow such power to grow; but, whatever may be the proper place to check it, each separate extension is certainly a step in "mutual aid or protection." * * *

> It is true that in the past courts often failed to recognize the interest which each might have in a solidarity so obtained * * *, but it seems to us that the act has put an end to this.
>
> * * * * *
>
> [S]o long as the "activity" is not unlawful, we can see no justification for making it the occasion for a discharge; a union may subsidize propaganda, distribute broadsides, support political movements, and in any other way further its cause or that of others whom it wishes to win to its side * * *.[14]

See also *Bethlehem Shipbuilding Corp. Ltd.* v. *National Labor Relations Board,* 114 F. 2d 930, 937 (C.A. 1): "[T]he right of employees to self-organization, and to engage in concerted activities, now guaranteed by Section 7 of the National Labor Relations Act, is not limited to direct collective bargaining with the employer, but extends to other activities for 'mutual aid or protection', including appearance of employee representatives before legislative committees."

The Taft-Hartley Act (61 Stat. 136), enacted in 1947, made a number of charges in the National Labor Relations Act, but did not materially alter the language or scope of Section 7 applicable here.[15] Thus, except for the effect of the union unfair labor practice provisions added by the Taft-Hartley Act,[16] the scope of Section 7, as reflected in Judge Hand's rationale in *Peter Cailler Kohler, supra,* remained the same.[17] The very specificity of the exceptions Congress added for certain secondary boycott activity and jurisdictional strikes (see n. 16, *supra*) confirms that it intended the scope of Section's 7's protection otherwise to remain undiminished.

Accordingly the courts and the Board have continued to interpret Section 7 as protecting a wide

[14] Petitioner seeks to distinguish *Peter Cailler Kohler* on the ground, *inter alia*, that "there was a specific dispute with management, over action taken by management, and in an area where management had the power to act" (Br. 14). Nothing in the court's rationale indicates that activities covered by Section 7 are so limited. Indeed, the last-quoted paragraph above reflects the basic consideration that the overall purposes of the NLRA in avoiding disruptions to commerce resulting from labor disputes are obviously as well served by concerted activity seeking legislative or other peaceful determinations of terms and conditions of employment that will avoid labor disputes as by activity directed to the resolution of those disputes after they arise. For early recognition by this Court of the preventive purpose of the Act, see *National Labor Relations Board* v. *Bradford Dyeing Assn.*, 310 U.S. 318, 326; *Consolidated Edison Co.* v. *National Labor Relations Board*, 305 U.S. 197, 221–222.

[15] A clause was added conferring on employees the right to refrain from the protected activities and the word "other" was inserted in front of "concerted activities for the purpose of collective bargaining or other mutual aid or protection." H.R. Conf. Rep. No. 510, 80th Cong., 1st Sess. 38–40 (1947); 1 Legislative History of the Labor-Management Relations Act, 1947, 542–544 (1948) ("Leg. Hist."); 93 Cong. Rec. 6442–6443 (1947), 2 Leg. Hist. 1538–1539.

[16] Section 8(b)(4)(A) made it an unfair labor practice for a union and its agents to engage in certain secondary boycott activity, and Section 8(b)(4)(D) made it an unfair labor practice for them to engage in certain jurisdictional strikes. Congress rejected a much broader ban on such activities contained in the House bill. See H.R. Rep. No. 245, 80th Cong., 1st Sess. 23–24 (1947); 1 Leg. Hist. 314–315.

[17] Indeed, this Court has since twice quoted portions of that rationale with approval. See *National Labor Relations Board* v. *Weingarten, Inc.*, 420 U.S. 251, 261; *Houston Insulation Contractors Assn.* v. *National Labor Relations Board*, 386 U.S. 664, 668–669.

range of employee concerted activity with respect to matters that have not involved specific disputes with the employees' own employer and which that employer has had no power to resolve or control. The archetypical example is a refusal to cross a lawful picket line of employees of another employer (see, *e.g.*, *National Labor Relations Board* v. *Rockaway News Supply Co., Inc.*, 345 U.S. 71, 81–82 (Black, J., dissenting); *National Labor Relations Board* v. *Alamo Express, Inc.*, 430 F. 2d 1032, 1036 (C.A. 5), certiorari denied, 400 U.S. 1021), but many others abound.[18]

Indeed, in *National Labor Relations Board* v. *Magnavox Co.*, 415 U.S. 322, this Court upheld the Section 7 right of employees to distribute literature on company property in support of or in opposition to their

[18] See, *e.g.*, *Kaiser Engineers* v. *National Labor Relations Board*, 538 F. 2d 1379 (C.A. 9) (sending letter to legislators stating opposition to competitor employer's application to import foreign employees); *Pioneer Natural Gas Co.*, 158 NLRB 1067, 1073–1075 (aiding organizational activity of employer's customers); *Broyles & Broyles, Inc.*, 166 NLRB 834, 835–836 (complaining about non-union conditions of another employer on construction site); *Washington State Service Employees State Council No. 18*, 188 NLRB 957, 958–959 (participation in protests against other employers' racially discriminatory hiring practices); *General Electric Co.*, 169 NLRB 1101, 1103, enforced, 411 F. 2d 750 (C.A. 9) (soliciting funds during non-working time on company property on behalf of striking farm workers); *Yellow Cab, Inc.* 210 NLRB 568, 569, 570 (distribution of leaflet on company property exhorting fellow workers to attend a rally "to support employees of other employers who were on strike and to oppose an alleged antilabor combination"); *Circle Bindery, Inc.*, 218 NLRB 861, enforced, 536 F. 2d 447 (C.A. 1) (employee report to union that a customer of his employer is in violation of a union label agreement).

bargaining representative. Although the selection or rejection of a bargaining representative is a matter for the employees to decide for themselves, and is not subject to the employer's control, the Court held that Section 7 protected the employees' right to distribute such literature in the plant, notwithstanding a contractual waiver of that right by the incumbent union representative. "The place of work is a place uniquely appropriate for dissemination of views concerning the bargaining representative and the various options open to the employees." *Id.* at 325.

The cases relied on by petitioner (Br. 10–18) do not reflect the application of a different principle or support petitioner's narrow construction of Section 7. In *National Labor Relations Board* v. *Bretz Fuel Co.*, 210 F. 2d 392 (C.A. 4), the court merely held that an employer had not violated Section 8(a)(1) and (3) when it refused to permit an employee of the union to continue working on its property because of his involvement in an unauthorized strike that was in breach of the union contract. In *G & W Electric Specialty Co.* v. *National Labor Relations Board*, 360 F. 2d 873 (C.A. 7), the court held that an employer had not violated Section 8(a)(1) when it discharged an employee for circulating a petition relating to a dispute among officials of the employee credit union; the court found that the interests of the employees in the operation of the credit union "was one arising from their status as borrowers or depositor-investors" and "was not an interest derived from their status as Company employees * * *." 360 F. 2d at 876. *National*

Labor Relations Act v. *Leslie Metal Arts Co., Inc.*, 509 F. 2d 811 (C.A. 6), involved a work stoppage arising in part out of a purely personal quarrel among employees. The court stated that a work stoppage "directed at circumstances other than conditions of employment" and "arising from purely personal quarrels unrelated to labor disputes with an employer" would not be protected by Section 7 (509 F. 2d at 813, 814)—statements that are not significantly different from the standard adopted and applied by the court below. In any event, the court in that case granted the Board's petition for enforcement on the ground that the walkout was in part in protest of the employer's failure to protect employees from physical violence from other employees. *Id.* at 814.[19]

[19] The other cases cited by petitioner and *amicus* Chamber of Commerce are also inapposite, *National Labor Relations Board* v. *Local Union No. 1229, International Brotherhood of Electrical Workers*, 346 U.S. 464 (cited at Br. 7, 18), involved picketing that disparaged the employer's product—an attack that had nothing to do with the employment relationship. *National Labor Relations Board* v. *Fansteel Metallurgical Corp.*, 306 U.S. 240 (cited at Br. 7), held that physical seizure of the employer's property by striking employees was not protected by Section 7. *Chemical Workers* v. *Pittsburgh Glass*, 404 U.S. 157 (cited at Br. 19), involved the question whether certain issues were the subject of mandatory collective bargaining under Section 8(a)(5). This case does not involve that question and, as noted, Section 7 by its terms encompasses more than activities directed to collective bargaining. *Shelly & Anderson Furniture Mfg. Co.* v. *National Labor Relations Board*, 497 F. 2d 1200 (C.A. 9), and *National Labor Relations Board* v. *Tanner Motor Livery Ltd.*, 419 F. 2d 216 (C.A. 9) (cited at Br. 8 n. 4, 15), did not involve the question whether the object of the protest was protected (the court in *Tanner* expressly recognized that it would be), but whether the means employed were protected.

In sum, the history of Section 7 and the cases construing it refute petitioner's contention that Section 7 encompasses only activities that are related to specific disputes between the employees and their employer over matters that the employer has the right or power to affect.[20]

The court of appeals, on the other hand, correctly applied established principles under Section 7. Although that court's formulation of the standard is in our view too narrowly focused on the relation of the employees with their own employer,[21] within that context the court correctly recognized the principle that

[20] Apart from the fact that petitioner's test is contrary to the language and purpose of Section 7 and the authorities construing it, any test that depended on the determination of an employer's right or power to affect a matter would present considerable difficulties of administration. An employer's "right" or "power" to "affect" a particular matter of employee concern would often be difficult to assess. Consider for example the issue of safe working conditions—a matter of obvious and direct concern to employees and one which the employer has clear power to affect. If employees sought the support of other employees for a public campaign on that issue that included support for legislative proposals, it would be difficult to determine how much "power" the employer had to "affect" the outcome of that issue. The employer plainly has the power or right to affect conditions in his own plant, but his power to affect the outcome of legislative proposals would turn on any number of political factors, including, perhaps, the effectiveness of his trade association in the state legislature.

[21] As the cases cited above establish (pp. 22–27, *supra*), Section 7 also encompasses concerted activities by employees in support of the employees of other employee. The principle that matters directly concerning certain employees also affects the interests of other employees—whether or not employed by the same em-

Section 7 rights include more than activities directed to collective bargaining or concerning matters that the employer has the right or power to affect. The court also correctly recognized, as the Board has held,[22] that Section 7 and the Act as a whole are concerned with employees in their status as employees, and does not encompass activities that are not reasonably related to that status.

Whether a particular activity is or is not reasonably related to the employees' status as employees is a question that turns on the "distinctive facts" of each case. *National Labor Relations Board* v. *Leece-Neville Co.*, 396 F. 2d 773, 774 (C.A. 5). We now show that the court correctly upheld the Board's determination that the particular circular involved in this case was sufficiently related to the employees' jobs or their

ployer—underlies the Act and is reflected in the very phrase "concerted activities for * * * *mutual* aid and protection." (Emphasis supplied.) See *National Labor Relations Board* v. *Weingarten, Inc.*, 420 U.S. 251, 260–262.

[22] For example, the Board has recognized that not all literature distributed by employees is reasonably related to their status as employees. In *Ford Motor Company*, 221 NLRB 663, the Board held that Section 7 protected distribution on company property by a dissident employee group of a newsletter dealing, *inter alia*, with national economic affairs and company overtime policies. At the same time, the Board found unprotected another newsletter which was "purely a political tract exhorting employees not to support the traditional parties and their candidates in the 1974 congressional elections, but to seek an independent workers' party. This is wholly political propaganda which does not relate to employees' problems and concerns *qua* employees." *Id.* at 666. See also *McDonnell Douglas Corp.*, 210 NLRB 280.

status as employees to warrant the protection of Section 7.

2. *The court of appeals correctly held that the union circular here had a reasonable relationship to the employees' jobs or their status as employees*

As noted, *supra*, p. 6, the Union's main reason for attempting to distribute its news bulletin was to "try to * * * strengthen the conviction of [its] members" and "try to get people who were working there [at the Company] who were nonmembers" to join. Sections 1 and 4 of the newsletter speak directly to the need for employees to join the Union and actively participate in its activities. Section 1 informs the Union's membership of the advantages of active participation in Union affairs and urges that employees attempt to influence the making of the Union's decisions by attending Union meetings and making their views known. Section 4 informs the employees of the advantages of "working together," exhorting employees who "stand Neutral" to accept the "strength, justice, and moderation" of unionism. These sections of the leaflet, as the Company acknowledged, directly concern the Union's position as a bargaining representative for the Company's employees, and the extent to which it will have the support of the work force in the forthcoming contract negotiations. In the words of Section 7, employee distribution of the circular as it related to those sections was an exercise of their "right to self-organization [or] to form, join, or assist labor organizations * * *."

The record also reflects that Sections 2 and 3 of the news bulletin were included for largely the same reasons—that is, to impress upon employees the importance of solidarity and collective action by relating those principles to specific matters of concern to the employees. To the extent those sections did not expressly exhort membership in the Union,[23] they nevertheless concerned matters of substantial concern to the employees as employees and their distribution was therefore for the purpose of "mutual aid or protection" within the scope of Section 7. Section 2 of the leaflet states the Union's view of the adverse effect upon unions of right-to-work laws; it speaks, in particular, to the danger of incorporation of the Texas right-to-work law into the state constitution, and also appeals to employees to write their representatives urging rejection of such action on that issue. Section 3 of the newsletter discusses President Nixon's veto of the minimum wage bill and urges employees to register to vote to support candidates favorable to an increase in the minimum wage. These sections were designed to provide information to the employees about matters arguably impinging significantly on their economic welfare. And both sections invited employees to

[23] But see the statements in Section 2: "[Right-to-work] laws do not improve wages or working conditions but just protect free riders. Free riders are people who take all the benefits of Unions without paying dues. They ride on the dues that members pay to build an organization to protect their rights and improve their way of life."

Those statements appear in part to serve the purposes of strengthening the conviction of union members and exhorting nonmembers to join.

take action which, if ultimately successful, might well improve the Union's position at the bargaining table.

As the Board noted, union security is "central to the union concept of strength through solidarity" (Pet. App. 17a) and would be a mandatory subject of bargaining in the absence of a state right-to-work law. The Union's interest in repeal of the state right-to-work law obviously would be set back if the law were to be incorporated in the state constitution, thereby making its repeal much more difficult. The level of the minimum wage is also of concern to the Company's employees, even though their rates were above the vetoed rate, because, as the Board stated, "[t]he minimum wage inevitably influences wage levels derived from collective bargaining, even those far above the minimum" (Pet. App. 18a).[24] Moreover, the vetoed legislation would directly affect the terms and conditions of employment of other employees, for whose "mutual aid or protection" petitioner's employees are entitled to exercise rights under Section 7 (see pp. 22–26, *supra*).

Nor are Sections 2 and 3 of the leaflet removed from the protection of Section 7 of the Act merely because they encourage traditional political action. As

[24] See Chamberlain, *Labor*, 435–437 (1958); Reynolds, *Labor Economics and Labor Relations* 272, (5th ed. 1970); Subcommittee on Labor of the Senate Committee on Labor and Public Welfare, Legislative History of the Fair Labor Standards Amendments of 1974, 94th Cong., 2d Sess., 868 (Committee Print 1976), (remarks of Senator Dominick, July 18, 1973). Cf. Marshall, *et al.*, *Labor Economics* 355–358 (3rd ed. 1976).

shown above (pp. 18–27), the language, history, and consistent Board and judicial interpretation of Section 7 negate any suggestion that it concerns only matters that are within the direct control of the employees' employer. Moreover, petitioning the legislature for the enactment of laws which will improve working conditions, or voting for legislators who are sympathetic to such laws, is a traditional (and constitutionally favored) means by which employees, no less than other citizens, can achieve such improvements; indeed, legislative change is often a precondition to negotiation with the employer about a subject.[25]

There is no reason to attribute to Congress an intent not to protect under Section 7 such essential and traditional means of improving employee working conditions—an intent that would be hard to reconcile with the Act's declared policy of "protecting the exercise * * * of full *freedom of association,* self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection" (29 U.S.C. 151, emphasis added). That was the conclusion reached in *Kaiser Engineers* v. *National Labor Relations Board*, 538 F. 2d 1379 (C.A. 9), in which the court held that Section 7 protected a civil engineer against discharge for joining with other employees in a letter to United States legislators stating their opposition to a competitor employer's application to the Department of Labor for permission to import foreign engineers. In language equally pertinent here, the court stated (*id.* at 1385):

> It is true, as Kaiser Engineers points out, that the activity involved no request for action on the part of the company, did not concern a matter over which the company had direct control, and was outside the strict confines of the employment relationship. It is also true, however, that the members of the Civil Engineering Society had a legitimate concern in national immigration policy insofar as it might affect their job security.
>
> We conclude that the concerted activity of employees, lobbying legislators regarding changes in national policy which affect their job security, can be action taken for "mutual aid or protection" with the meaning of § 7 * * *.[26]

Cf. *National Labor Relations Board* v. *Industrial Union of Marine and Shipbuilding Workers of America,* 391 U.S. 418, 424.

In sum, the court of appeals correctly upheld the Board's determination that distribution of each of the

[25] For example, in a right-to-work state like Texas, the employees could not negotiate a union security agreement with the employer unless they had first obtained a repeal of the right-to-work law.

[26] Petitioner contends (Br. 15) that *Kaiser Engineers* is distinguishable because the employees there "sought a specific result on an issue of threatened job security." However, the employees in *Kaiser* were not protesting any action taken by their employer which had a direct or immediate effect on their employment conditions. Rather, they were protesting against an exemption from existing law requested by another employer which might in the future have an adverse impact on those conditions.

four sections of the news bulletin constituted the exercise of rights protected by Section 7.[27]

B. THE COURT OF APPEALS CORRECTLY HELD THAT PETITIONER'S BAN ON THE DISTRIBUTION OF THE NEWS BULLETIN IN NON-WORKING AREAS ON NON-WORKING TIME WAS NOT JUSTIFIED BY PETITIONER'S PROPERTY INTERESTS

If the Court were to accept petitioner's principal contention that the distribution of the news bulletin was outside the scope of Section 7 because of the content of two of its sections and also to reject our alternative ground for affirmance of the court of ap-

[27] The court's decision upholding the Board's determination that the distribution of the news bulletin was within the scope of Section 7 is further supported by two additional considerations that should guide judicial review of such determinations. First, the application of general standards to particular facts is primarily the task of the agency charged with the administration of the statute, and courts should defer to the agency's determination if it falls within a zone of reasonableness. As this Court recently reiterated in *National Labor Relations Board* v. *Weingarten, Inc.*, 420 U.S. 251, 266–267, Congress entrusted to the Board the primary responsibility for elucidating the scope of Section 7.

Second, the declared policies of the National Labor Relations Act indicate that the scope of employee rights protected by Section 7 should not be rigidly or narrowly construed (*supra*, p. 34). As we next discuss, the Board and the courts have the capacity to accommodate the *exercise* of those rights to an employer's legitimate property interests. But the Board and the courts should not narrowly construe the scope of those rights themselves, lest employees be stripped of all protection for activities within the concern of the Act, and lest, in this context particularly, the Board be cast in the role of censor minutely scrutinizing and ruling upon the subject matter of employee literature. Cf. *Columbia Broadcasting System, Inc.* v. *Democratic National Committee*, 412 U.S. 94, 120–121.

peals' decision (discussed in point C, *infra*), then the Act would not restrain petitioner's ban on the distribution. Indeed, it would not restrain petitioner from discharging employees for distributing the bulletin either on or off petitioner's premises, or even for advocating the positions taken therein (see n. 8, *supra*).

If, as we urge, the Court rejects petitioner's narrow construction of Section 7, then the question remains whether the limitations imposed by petitioner on the exercise of the employees' Section 7 rights are justified by its legitimate interests in such matters as production or plant discipline. For it is well settled that when conflicts arise between the exercise of Section 7 rights and private property interests, the Board and the courts are to seek a proper accommodation between the two "with as little destruction of one as is consistent with the maintenance of the other." *National Labor Relations Board* v. *Babcock and Wilcox Co.*, 351 U.S. 105, 112; see also *Hudgens* v. *National Labor Relations Board*, 424 U.S. 507, 521.

As an alternative to its principal position, therefore, petitioner contends that its property interests here outweigh the "nature and strength of the Section 7 rights asserted" in this case (Br. 26–30). We disagree.

Although accommodation between property interests and Section 7 rights depends on the facts of each case, the Board and the courts have established general principles governing that determination. The principle that is most firmly established by decisions of the Board and this Court is that the distribution

of union literature (1) by employees lawfully on the premises, (2) on non-working time, and (3) in non-working areas, may not be prohibited by the employer "'in the absence of evidence that special circumstances make the rule necessary in order to maintain production or discipline.'" *Republic Aviation Corp.* v. *National Labor Relations Board,* 324 U.S. 793, 804 n. 10 (quoting from the Board's decision in *Peyton Packing Co., Inc.,* 49 NLRB 828, 844). As the Court noted in *Hudgens* v. *National Labor Relations Board, supra,* 424 U.S. at 521–522, n. 10, Section 7 activity "carried on by employees already rightfully on the employer's property" involves "the employer's management interests rather than his property interests."

Petitioner has never advanced, and does not advance in its brief to this Court, any interest in production, discipline or other management concern that would explain or justify its blanket prohibition of the distribution of the union news bulletin by employees on non-working time in non-working areas. The only interest advanced by petitioner is a naked property interest in its premises. That interest obviously is not a "special circumstance" justifying the ban.

Nor is there merit to petitioner's contention (Br. 30) that its ban was warranted by the availability to the Union of alternate avenues of communication. This Court in *Magnavox, supra,* rejected the same contention in a case where, as here, no showing had been made of special considerations justifying a ban on union solicitations. As the Court there stated,

"[a]ccordingly, this is not the occasion to balance the availability of alternative channels of communication against a legitimate employer business justification for barring or limiting in-plant communications." 415 U.S. at 326–327.

Finally, there is no basis for petitioner's contention (Br. 31–33) that the court of appeals usurped the Board's function in arriving at a proper accommodation between the employer's interests and the employee's Section 7 rights. The cases cited above establish that employer bans on distribution of union literature by employees in non-working time and in non-working areas are presumptively invalid in the absence of special circumstances. In other words, the burden is properly upon the employer to come forward with reasons justifying the prohibition. When petitioner failed to do so, the Board expressly applied the established presumption (Pet. App. 19a) and the court correctly affirmed that decision. See *e.g., Magnavox, supra.*

C. THE JUDGMENT BELOW MAY BE AFFIRMED ON THE ALTERNATIVE GROUND STATED BY THE BOARD THAT PETITIONER COULD NOT PROHIBIT DISTRIBUTION OF THE NEWS BULLETIN IN VIEW OF THE PORTIONS THAT WERE CONCEDEDLY WITHIN THE SCOPE OF SECTION 7

In its decision the Board held, as an alternative ground, that, even if Sections 2 and 3 of the news bulletin did not have "Section 7 pertinence [petitioner] would not thereby have been justified in denying its distribution" (Pet. App. 18a). The Board

relied on its earlier decision in *Samsonite Corp.*, 206 NLRB 343, 346, where it had adopted the principle that (Pet. App. 18a):

> The fact that some of the articles in the newsletter contained gratuitous remarks or "social comment" matters does not detract from the conclusion that the distribution * * * was a concerted activity [protected by Section 7].

Accord: *The Singer Company,* 220 NLRB 1179, 1180.

The court of appeals rejected that conclusion as an alternative ground, stating that "the presence of some § 7 protected material will not rescue that which is significantly not protected" (Pet. App. 41a–42a).[28] We submit that the court misconceived the Board's alternative holding and erroneously rejected it as a valid basis for upholding the Board's decision.

The Board did not hold or suggest that the presense of *any* protected material, however sparse, would protect the distribution of material that is unprotected, however voluminous, and we do not so contend. On the other hand, it would be quite untenable to hold that an employer can comb a union news bulletin and prohibit its distribution if he finds one sentence of extraneous "social comment." Such a conclusion would seriously undermine the rights of employees under Section 7 and place the employer in the position of censor over proposals and literature of the union and its employees.

[28] The court also rejected an argument the Board had not made; namely, that "the least Eastex could have done was to excise the objectionable portions of the bulletin and permit the distribution of the unobjectionable portion" (Pet. App. 42a). The Board, in fact, made the opposite argument, i.e., that the entire leaflet was protected by Section 7 so long as it included, in substantial part, matter which was clearly within its ambit.

Rather the Board's alternative holding, viewed in the context of this case and the statement in *Samsonite* on which it relied, is that an employer may not ban otherwise protected distribution of employee literature that pertains in *substantial part* to those matters protected by Section 7, on the ground that the literature also contains unprotected social or political comment, and may not require the employees to excise the unprotected portions.[29] That standard, we submit, properly protects Section 7 rights from unwarranted restraint or interference.

Applied to the facts of this case, it properly provides an alternative basis for the Board's decision. Two of the four sections of the news bulletin (Sections 1 and 4) were clearly within the scope of Section 7 and petitioner so admitted. Moreover, Sections 2 and 3 were related to and in large part an amplication of the theme set forth in Sections 1 and 4. In those circumstances, the Board correctly concluded that petitioner could not prohibit the distribution of the bulletin even if Sections 2 and 3 did not independently come within the scope of Section 7's protection.

[29] If the protected portions and unprotected portions are readily severable, the result may be different. For example, *Ford Motor Co. supra*, n 22, involved two news bulletins, one of which was substantially unrelated to the employees' jobs or status as employees, and the Board upheld the company's prohibition of that bulletin's distribution.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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In the

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-453

EASTEX, INCORPORATED,

Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

Brief Amicus Curiae In Support of Petition On Writ of Certiorari to the United States Court of Appeals For The Fifth Circuit

BRIEF ON BEHALF OF CHAMBER OF COMMERCE OF THE UNITED STATES AS AMICUS CURIAE

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INTRODUCTION

This brief on behalf of the Chamber of Commerce of the United States, as *amicus curiae,* is filed pursuant to written consent of the parties under Rule 42(2). It is in support of the petitioner, Eastex, Incorporated.

INTEREST OF THE AMICUS CURIAE

The Chamber of Commerce of the United States of America is a federation consisting of over 3,700 state and local chambers of commerce and trade and professional associations, and has a direct business membership in excess of 65,000. It is the largest association of business and professional organizations in the United States.

The Chamber regularly represents its member-employers in important labor relations matters vitally affecting their interests before the courts, the United States Congress, the Executive Branch and independent regulatory agencies of the federal government. Such representation constitutes a significant aspect of the Chamber's activities. Accordingly, the Chamber has sought to advance those interests in a wide spectrum of labor relations litigation.[1]

This case presents issues that are of overwhelming importance to the business community, to employers and employees, to this Nation's basic political institutions, and to the rights of private property ownership. Large and small employers throughout this Nation will be affected by the Court's decision in this case.

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[1] See, e.g. *Buffalo Forge Co. v. United Steelworkers of America*, 428 U.S. 397 (1976); *Connell Construction Co. v. Plumbers and Steamfitters Local Union No. 100*, 421 U.S. 616 (1975); *Gateway Coal Co. v. United Mine Workers of America*, 414 U.S. 368 (1974); *William E. Arnold Co. v. Carpenters District Council of Jacksonville*, 417 U.S. 12 (1974); *Alexander v. Gardner-Denver Co.*, 415 U.S. 36 (1974); *Super Tire Engineering Co. v. McCorkle*, 416 U.S. 115 (1974); *NLRB v. Bell Aerospace Co. Division of Textron, Inc.*, 416 U.S. 267 (1974); *Boys Markets v. Retail Clerks Union*, 398 U.S. 235 (1970); *NLRB v. Granite State Joint Board*, 409 U.S. 213 (1972); *NLRB v. Pittsburgh Plate Glass Co.*, 404 U.S. 157 (1971); *Booster Lodge No. 405, International Association of Machinists v. NLRB*, 412 U.S. 81 (1973).

This amicus brief is divided into two parts. The first part discusses the practical implications and burdens that would be placed on employers and their private property if the decision below is permitted to stand. The second part will present the legal arguments supporting reversal of the court below.

SUMMARY OF ARGUMENT

Section 7 of the National Labor Relations Act, as amended,[2] creates *employee rights,* not union rights. Employees are guaranteed the right to organize, join unions, bargain collectively and engage in concerted activities *for the purpose of* collective bargaining or other mutual aid and protection. The Fifth Circuit concluded that Section 7 also protected the distribution *on private property* of political materials prepared by the union urging opposition to a state right-to-work law and support of federal minimum wage legislation.

In so concluding, the Fifth Circuit has created new Section 7 rights, unwarranted by legislative history, unsupported by case authority and resulting in serious practical consequences.

The legislative history of Section 7 reveals a congressional concern addressed exclusively to an individual's status as an employee — that is, the employee's relationship *vis-a-vis* his employer. The Fifth Circuit's analysis of the political literature in question here demonstrates that this material sought to advance interests of the union involved and of organized labor generally. Because of the nature of the political literature here — and because it admittedly addressed issues beyond the employer-employee relationship —

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[2] 61 Stat. 136, 73 Stat. 519, 29 U.S.C. §151 et seq.

this case cannot turn on the narrow question of whether the persons who sought to perform the actual distribution were employees of the particular employer.

The Fifth Circuit found that the literature itself was protected by Section 7, and then concluded that its distribution on private property was equally protected. That holding not only expands Section 7 beyond the intent of its drafters, it writes new law unsupported by other authority.

The distribution of political (though labor related) material is not an activity protected by Section 7. Even if such activity might fall within the "broad umbrella" of Section 7, it is so clearly on the periphery that this Court should hold as a matter of law that the compelling constitutional consideration of private property interests outweighs the arguable Section 7 right.

If the Fifth Circuit's decision is allowed to stand, it will have a practical impact well beyond its facts, and raise far more questions than it answers. Amicus would urge that this precedent would at the very least: (1) place no effective limitation on the subject matter or volume of political materials which could be distributed on an employer's property; (2) furnish no restriction as to what interest group might choose to utilize this new avenue of communication; (3) subject an employer's property to competing propaganda from differing points of view; (4) thrust on an Administrative Law Judge the responsibility to censor political literature — and then only in the context of an unfair labor practice hearing alleging that an employer has violated federal law; (5) open the law of collective bargaining to possibly newly created mandatory subjects of bargaining; and (6) subject a private employer to possible criminal sanctions for lending assistance to political advertising, while at the same time effectively barring any response.

The Fifth Circuit misread the legislative history and case law development of Section 7, and it failed to consider the enormous potential impact of its decision in other areas. Its decision should be reversed.

I.

PRACTICAL IMPLICATIONS OF THE DECISION BELOW

A. Introduction.

The essential issue in this case is unique in the annals of this Nation's political and labor history. As the court below stated, "[W]e are, in the Astronautical Age, exploring new space, with only limited or hierarchical limitations imposed."[8]

This Court's decision will determine the fundamental rights of employers throughout the country to maintain their private business premises free from virtual unlimited use by others — for political and other purposes unrelated to the employer's direct relationship *vis-a-vis* its employees. More precisely, the question is whether an employer such as Eastex shall be forced to permit unions, their representatives, members, non-union employees, and others acting with them, to use its private business property for the purpose of the distribution of politically oriented materials. Stated another way, the issue is whether an employer will be

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[8] *Eastex, Inc. v. NLRB*, 550 F.2d 198, 199 (5th Cir., 1977).

required, by virtue of newly expanded Section 7 rights, to support the dissemination of political propaganda on its private property.

The literature at issue here was political, addressed to political issues of general concern to organized labor. It was not in response to any act or statement by Eastex. The court below characterized this material as concerning a "highly charged emotional issue", and one which generated "controversy".[4] Amicus suggests that extension of Section 7 protection to distribution of such materials on private property is not only without support in the statutory language or case authority, it is also contrary to constitutional precepts and common sense.

B. The Predictable Impact.

Amicus invites the Court to consider questions which would inexorably arise if this "wedge" is permitted to open the door to a new roomful of yet undiscovered Section 7 rights. Amicus believes that the following discussion illustrates the very real legal, political and economic concerns which employers throughout the Nation feel as they await the outcome of this case.

1. **The subject matter and the volume of political materials which could be legally distributed on employer's property under the Fifth Circuit's "reasonably related" test is virtually unlimited.**

The court below, in adopting that test, relied heavily on the decision of the Ninth Circuit in *Kaiser Engineers v. NLRB*.[5] The

[4] 550 F.2d at 205.

[5] 538 F.2d 1379, 1384 (9th Cir. 1976).

obvious threshhold question presented is how to delineate the bounds of matters "reasonably related" to jobs, or of "legitimate concern" to employees. Posing the question itself illustrates the practical impossibility of limiting political material which might fall within the definition.

Virtually everything which affects the lifestyle of employees and their families may be argued to be of legitimate interest. For example, thousands of statutes, regulations and ordinances are proposed by various officials on federal, state and local levels each year — and probably most have some arguable impact on jobs or at least concern matters of "legitimate concern" or "reasonably related" job interest. Accordingly, most could be argued to be within this newly declared Section 7 protection. Thus, political propaganda supporting or opposing such legislation, and other similar political issues, could presumably be distributed freely on an employer's private property.

There is no conceptual difference between a statute affecting jobs or employment, and a candidate who urges such statute's passage, or an incumbent politician who might oppose it. Thus, literature specifically urging the support or opposition of candidates would be subject to unhampered distribution on an employer's private property, beyond the control or oversight of the employer.

Money is the lifeblood of politics. A union authorized by the Fifth Circuit's proposed test to support general political issues, and candidates with whom the union might agree or disagree would be entitled to solicit contributions for the benefit of that candidate on the employer's private property.

The Fifth Circuit's proposed test would place no limit on the *volume* of material which might be freely distributed. Dozens of leaflets — or even entire newspapers — could fall within the "reasonably related" test, and thus acquire an immunity from employer intervention.

The point here is simple: No great ingenuity would be required to design and write political propaganda for virtually any issue or any candidate which stressed issues affecting jobs or impact on employment of legitimate concern to organized labor. If the Fifth Circuit's test is approved, this Court will have furnished guidelines to the writers of political material, showing them how to design material which may be freely distributed on employers' property.

2. The Fifth Circuit's holding would open the door to virtually any interest group wishing to promote its favorite political cause on an employer's private property.

The specific issues in the instant case — distribution of literature opposing right-to-work legislation, and supporting minimum wage legislation — are admittedly beyond the scope of the relationship of the employer *vis-a-vis* his employee. As discussed above, the political issues addressed by the literature here affect only the relationship of the employee to his union, and the union to the general public. In other words, the material sought to be distributed did not affect the standing of employees *qua* employees — but rather addressed matters of general political concern. Accordingly, whether a person who would seek to distribute political literature is an employee or non-employee is without relevance within the context of this case.

The facts here demonstrate this to be so. The political literature came from the union president and his executive council. There can be no conceptual difference between the distribution of union-originated general political material, whether it be by employee or non-employee. Even if this proposed "right" were limited to employees, all a union — or anyone else — need do is recruit an employee as a vehicle for distribution of its political views.

3. The Fifth Circuit's test could convert an employer's private property into a battleground where different political points of view urged by different parties might compete for time and space, unhampered by the point of view of any employer.

The interests of organized labor are not monolithic. The interests of individual employees are no more so. To illustrate, consider the example of the right-to-work legislation addressed by one of the paragraphs in the literature being considered here.

Obviously various persons will have different positions on this issue. Does each such person have the right under the Fifth Circuit's test to utilize the employer's private property as his forum? Non-union employees might argue in favor of such legislation because they oppose unions in general. Dissident union-member employees might argue for such legislation because of their opposition to the incumbent union's policies or conduct. Union elected officials might wish to take somewhat different positions or remain silent on the issues, saving their political persuasion for other battles. Other union-member employees might

strongly support repeal of such legislation. Within any of these groups, certain individuals may dissent from the consensus.

Under the Fifth Circuit's test, every point of view, and every dissent, would now be entitled to equal hearing on the employer's private property, even if an employee must be obtained as a vehicle for gaining access.

4. Under the Fifth Circuit's proposed test, the only possible review of political propaganda distributed on employer's private property would be by an NLRB Administrative Law Judge, after extensive litigation, subjecting the employer to the possibility of having committed an unfair labor practice.

Under the Fifth Circuit's test, distribution of political material on the employer's property has been approved — subject only to the vague limitation that such material be "reasonably related" to the employees' jobs. The only manner in which this limitation could be invoked by the employer would be for him to prohibit the distribution, thus subjecting himself to a charge of violation of Section 8(a)(1) of the Act — precisely what happened to Eastex in the instant case.

After the expense and delay of investigation of the charge and assignment of an Administrative Law Judge to hear the case, that randomly assigned Law Judge would find himself in a unique position in American jurisprudence. He would be the *de facto* censor to determine — many months after the incident — whether political propaganda generated by the union should be granted his "Section 7 imprimatur" as he applied his understanding of the Fifth Circuit's guidelines in determining whether such propaganda might be "reasonably related" to jobs.

The proposed labor reform legislation, now pending in the United States Senate, is not without significance to this case.[6] An employer guilty of unfair labor practices would be subject to "debarment" — or the cancellation of his government contracts — a result which could spell economic disaster. Awareness of such sanctions would certainly make any government contractor reluctant to challenge the subject matter of political material being distributed — and thus broaden the scope of union activity in this new area.

5. The decision of the Fifth Circuit adversely affects the collective bargaining process and labor relations.

If compulsory distribution of politically oriented and polemical materials is to be permitted as a new Section 7 right, then it follows that unions and employee groups can make demands at the bargaining table concerning such distributions and use of company property. If such topics are deemed mandatory subjects of bargaining, the employer — if he chooses not to capitulate to the union's demands — bargains at his peril and faces the specter of unfair labor practice findings and the serious consequences which would follow.

6. Pursuant to recent federal and state legislation governing corporate employers' contributions to and participation in political activity, a corporate employer would stand virtually gagged, deprived of any effective right to urge his own point of view with regard to political opinions expressed on his own property.

Quite incongruously, if a corporate employer were to attempt to refute, correct, clarify or comment on political materials alleged

[6] S. 2467, 95th Cong., 2nd Sess. (1978). See also H.R. 8410, 95th Cong., 1st Sess. (1977).

to be of employee job-related interest, or on subjects under legislative consideration, that employer would face possible dire consequences. Both the Federal[7] and the State of Texas[8] statutes relating to political campaigns, elections and legislative matters make it unlawful for a corporate employer to engage in conduct which constitutes a grant "of anything of value", or "any services" "directly or indirectly", for the purpose of influencing the nomination or election of any individual, or (Texas statute only) "aiding or defeating the approval of any measure submitted to a vote of the people of this *state or any subdivision thereof*" (Emphasis

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[7] 2 U.S.C. §431 *et seq.*
Title 2, The Congress, §431, "Definitions", (f) defines "expenditure":
"(f) 'expenditure'
(1) means . . . *anything* of *value* . . . made for the purpose of *influencing the nomination for election, or election, of any person to Federal office*..." (Emphasis added).

[8] The Texas Election Code, Article 14.01, V.A.T.S., Definitions, provides:
"(R) *'Political advertising'* is defined as anything in favor of or in opposition to any candidate . . . or . . . to any measure submitted to a vote of the people, which is communicated in any of the following forms:
• • • •
"(2) *any handbill, pamphlet, circular, flier,* commercial billboard, sign, bumper sticker, or similar printed material." (Emphasis added).
Article 14.06(C) provides:
"(C) As used in this section, the phrase *'contribution or expenditure'* shall also include . . . *other thing of value, directly or indirectly,* to any candidate or political committee . . . or any other person, for the *purpose of aiding or defeating the nomination or election of any candidate or of aiding or defeating the approval of any measure submitted to a vote of the people of this state or any subdivision thereof* . . ." (Emphasis added).
Article 14.06(A) outlaws corporate "contributions," and Article 14.06(E) and (F) provide that violations shall constitute "a felony of the third degree" (for which the sanction "shall be" confinement for two to ten years plus a fine of up to $5,000, Texas Penal Code, Section 12.34).

added). Thus, the employer would stand muted, or invite serious consequences if he attempted to intervene.

The practical implications of the Fifth Circuit's decision are monumental. International unions, local unions, non-union groups and political groups composed in part by employees or acting through them, could utilize an employer's private property to launch direct attacks on any of this Nation's labor laws, executive orders, regulations or directives which they did not like, or endorse those which they approve. The circular in the instant case involved the urging of political action on the right-to-work issue and the veto of minimum wage legislation, and complained of profiteering by the oil industry. But the result apparently would have been the same if the material had urged political action and votes on a wide range of other political subjects which could be said to be reasonably related to jobs or of legitimate interest to the employees. In this legislative battleground, the following might fall: labor reform legislation, public work programs, equal pay, hiring the handicapped, veterans preference, union racketeering or featherbedding, union reporting and disclosure requirements, equal employment opportunity, compulsory age retirement, common situs picketing, age discrimination, pension legislation, social security, pension benefits, various kinds of taxes, child care for workers, workmen's compensation, health care, school tuition, federal or state holidays, occupational health and safety, aliens, farmers, the miners' strike, retirement, traffic congestion and road conditions, full employment legislation, public construction related to municipal bond elections, unemployment compensation, foreign trade and foreign imports, product boycotts, embargoes, adequate law enforcement and protection to and from the work-

place, the equal rights amendment, pay increases for state and local employees, or the foreign operations of multinational corporations — and *candidates who have taken a position* on any such issues.

Unions presently spend many millions of dollars each year on various projects within the framework of our political institutions. Millions are spent for alleged "voter education" programs, by such organizations as the AFL-CIO's Committee on Political Education. It is a way of political life for unions to help finance political candidates in a number of assorted ways. Literally thousands of legislative bills are introduced each year at the various levels of Federal and State government, and unions are known for their ingenuity in finding ways to effectively make their views known and in helping to elect their preferred candidates. It is common knowledge that thousands of political candidates across the country are assisted in myriads of ways by unions and their members each year. Can it seriously be doubted that politicians and political groups could not find ways to work with unions and employees to campaign within employers' plants across the country?

If the decision below is permitted to stand, for the first time in our history unions and other groups with employee participation will be able to demand that political materials of their choice — materials that they have prepared and paid for — be distributed inside the employer's private place of business, against his will.

What a financial and political boon this would be for unions, employee groups, politicians, the many different political and

activist groups, and the political positions they support! They could effectively blanket thousands, even millions, of captive employees at comparatively little expense, with materials of their choice — materials that could not be edited or responded to by the employer regardless of content. As matters of political interest which were "reasonably related" or of "legitimate concern" proliferated — and the number of political candidates and the issues likewise proliferated — employers could expect large quantities, quite possibly avalanches of political materials to flood their business premises. Obviously, such distributions would be greatly distracting, if not disruptive, thereby adversely affecting employee productivity.

If unions acting through employees have this newly created "political pipeline" into an employer's place of business, then presumably the Democratic Party, the Republican Party, the American Socialist Party, the American Communist Party, the American Nazi Party and other political groups have the same right.

In *Lloyd Corporation v. Tanner*,[9] this Court, rejecting First Amendment arguments, denied a political activist group the right to use private property for the distribution of anti-Vietnam circulars. Here, the Fifth Circuit, creating a new Section 7 right, would permit the employer's private property to be used for admittedly political purposes. The apparent differences in the two cases are that in *Lloyd*, the political activists did not include any employees, and their circular related to the Vietnam conflict. Here, the union would use employees as the vehicle to distribute their message; and, obviously, it would be a simple matter to include activist handouts as subject matter which would arguably

[9] 407 U.S. 567 (1972).

fall within the Fifth Circuit's vague, and almost boundless, test of "reasonable relatedness." Thus, if the decision below is permitted to stand, then it appears that the Court will have come "full circle" from *Lloyd,* meaning that unions and different political groups will have the right to use the employer's property to distribute their polemics.

II.

QUESTIONS RELATED TO THE EMPLOYEES' ALLEGED SECTION 7 RIGHTS TO DISTRIBUTE POLITICAL AND POLEMICAL MATERIALS ON THE PETITIONER'S PRIVATE PROPERTY

A. First Amendment Considerations.

No First Amendment Constitutional issues regarding freedom of expression are raised by this case. Although the Fifth Circuit below initially (550 F.2d at 203) made reference to First Amendment considerations, it correctly deleted those references in response to Eastex' petition for rehearing and rehearing *en banc.*[10]

In *Central Hardware Co. v. NLRB,*[11] this Court, in rejecting the contention that the providing of public parking lots by the owner of a retail store subjected that owner to First Amendment restraints, observed:

> "Before an owner of private property can be subjected to the commands of the First and Fourteenth Amendments, the privately owned property must assume to some significant degree the functional attributes of public property devoted to public use. The First and Fourteenth Amendments are limitations on state action, not on action by the owner of private property used only for private purposes."

[10] 556 F.2d 1280, 1281 (5th Cir. 1977).

[11] 407 U.S. 539, 547 (1972).

The same result was reached by this Court in *Hudgens v. NLRB*[12] (involving the right of employees to engage in economic picketing on private property not owned by the employer). As in *Hudgens,* resolution of the issues presented by this case depend solely on the Court's interpretation of Section 7 of the Act.

B. Employees vs. Non-Employees

The Board's decision suggests that *only the rights of employees* are involved here. This is not true, for here the union published the material and was the movant to have it distributed for its own purposes. The Board in opposition to *certiorari,* did not urge the Court to extend the Fifth Circuit's newly-discovered Section 7 rights to any persons other than employees, but that is the result of the decision below. Indeed all that is required is that non-employee groups have the assistance of two or more employees.

This Court has long considered the distinction between employees and non-employees to be of substance in cases involving other rights asserted under Section 7. In *NLRB v. Babcock & Wilcox Co.,*[13] this Court placed much greater restrictions on non-employee union organizers than were placed on employee

[12] 424 U.S. 507 (1976).

[13] 351 U.S. 105 (1956).

union organizers.[14] However, that distinction was considered to be "one of substance" (351 U.S. at 113) *only* in the context of a union organizational campaign, an activity that falls squarely within the heart of Section 7. This Court left no doubt that its concern for organizational activity was central to its decision in *Babcock*.[15]

The distinction between employee and non-employee rights loses its "substance" in the context of the rights being urged here. The asserted right to distribute general (though labor related) political propaganda is admittedly not a matter involving *any direct relationship between the employee and his employer.*[16] As the court below observed, the materials here reflected the general goals of the union and the interests of organized labor, as distinguished from the specific desires of employees *vis-a-vis* their employer.

Here, the decision and request to distribute the materials in question were made by union president Boyd Young with the concurrence of the union executive board.[17] Thus, it was clearly

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[14] See *Republic Aviation Corp. v. NLRB*, 324 U.S. 793 (1945).

[15] See *Central Hardware Co., supra.*

[16] The Fifth Circuit described the publication as "neutral to Eastex" — thus, clearly showing that the issue of interest to the union or the employee was wholly unrelated to the employer. The court observed of the challenged political literature that "it was done out of direct, tangible employee-union self interest" — which defines a relationship from which the employer is necessarily excluded. With regard to the literature involving the right-to-work laws, the court observed that the subject matter was one "on which organized labor . . . has a . . . direct interest . . ." (550 F.2d at 204).

[17] Findings of the Administrative Law Judge, 215 NLRB 272-273.

the intent of the union officials to use employees as mere vehicles for the distribution of their political literature, for the furtherance of the generalized goals of the union and organized labor. Accordingly, the "substantive" distinction made in *Babcock* between employees and non-employees (recognized by *Central Hardware* to be limited to organizational activities) should be of no significance in this case.

C. The Distribution of Political and Polemical Material on Private Property Is *Not* a Statutory Right Under Section 7 of the Act.

Section 7 includes a well-defined group of employee rights. Examination of the clear language of Section 7 and its legislative history indicates that Congress intended only to protect employee rights that arise in the context of the direct employer-employee relationship.[18] The Board and the courts have analyzed and defined these rights in numerous cases providing guidelines which distinguish between protected and unprotected employee activities.

The individual's *status as an employee* gives him the right to self-organization, to join or assist a labor organization, and to engage in concerted activities for the purpose of collective bargaining or other mutual aid and protection — or to refrain from all of these activities.[19] These rights are not to be viewed in

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[18] See *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 33 (1936) wherein Chief Justice Hughes acknowledged that the statute is limited in its purposes and "goes no further than to safeguard" the rights enumerated in Section 7. See also, *NLRB v. Fansteel Metallurgical Corp.*, 306 U.S. 240, 255 (1938) and *NLRB v. Sands Mfg. Co.*, 306 U.S. 332 (1939).

[19] See *Republic Aviation Corp., supra.*, which placed the emphasis of the Act on collective bargaining.

isolation, but are rather "part of a reticulated legislative scheme with interlacing purposes."[20]

Section 7 does not protect literature. It gives employees rights and protects some of their *activities*. Although the court below recognized briefly the difference between on-premise and off-premise activities ("[T]he scope of Section 7 rights . . . when exercised off the employer's property . . . (is) doubtless limited only by valid general law of the situs and the First Amendment"[21] that court focused its analysis on the literature itself. Once the court concluded that the literature was protected, it leaped to the correlary conclusion that its distribution on private property was similarly protected. In doing so, the court addressed only half the question. Its analysis ignored the unique issue in this case — the interference with the employer's private property rights.

In reaching its decision, the court observed that "we have never been faced with quite this problem before."[22] This observation is simply a recognition that neither the Board nor any other court has ever before believed that Section 7 rights extended to the kinds of activities involved in this case. Then the court proceeded to create broad new Section 7 rights unknown for more than 40 years of the Act's existence.

Legislative history, case authority and important practical considerations all weigh against the court's extension of Section 7

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[20] *NLRB v. Insurance Agent's International*, 361 U.S. 477, 510 (1960).

[21] 550 F.2d at 202.

[22] 550 F.2d at 199.

protection to the distribution of political literature on private property. The Congress, in drafting Section 7, addressed its concern only to matters directly involving the employer-employee relationship. The cases relied on by the Fifth Circuit in reaching its conclusion are noteworthy only in that they lack the controlling element of importance here — namely, distribution of political literature on private property.

Nothing in the legislative history even remotely suggests that Congress intended to give a union, its members, or non-union employees or others acting with them, the right to distribute these kinds of material on an employer's private property. In-depth study of the legislative history of Section 7 reveals that Congress clearly intended to limit these rights to conduct directly or immediately involving the employer-employee relationship — to permit employees to engage in union organizational activities free from employer interference, to encourage collective bargaining and to protect concerted activities insofar as their wages and terms and conditions of employment were concerned.

Senator Wagner, author of the bill, summed up the intent of the bill in stating:

> "The whole philosophy of this legislation is to deal with the relationship between employees and employers." 79 *Cong. Rec.* 7670.

This viewpoint was also expressed by members of the conference committee.[23] Senator Walsh, a major force on the conference

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[23] 79 *Cong. Rec.* 7650.

committee, was instrumental in developing the course of the legislative history in his efforts to assure passage of the bill. He specifically detailed the outer limits of Section 7 during debate over that aspect of the bill, stating:

> "The bill does provide the means and manner in which employees may approach their employers to discuss grievances and permit the Board to ascertain and certify the persons or organization favored by a majority of the employees to represent them in collective bargaining, when the question of that representation is in doubt or dispute. *Beyond this the bill does not go.*" 79 *Cong. Rec.* 7659. (Emphasis added.)

The legislative history clearly reveals that Congress intended that there be limits to Section 7 rights. The legislative history glaringly omits any discussion or the slightest reference to the right of unions and employees to distribute politically-oriented material on the employer's private property. Indeed, there is nothing in the legislative history to suggest that any member of Congress ever thought that the statute would permit these kinds of intrusions into the domain of private property rights.

Similarly, the Fifth Circuit's conclusion finds no support from other courts. Under the guise of the "other mutual aid or protection" language of Section 7, the court below concluded that the literature in question was "reasonably related to the employees' jobs or to their status or condition as employees in the plant," (550 F.2d at 203). This conclusion clearly runs counter to numerous decisions rendered by this Court and several circuits.

The Fifth Circuit's broad "reasonably related" rule opens a virtually unlimited Pandora's box of protected activities, notwithstanding rulings by this Court and several circuit courts that have recognized that Section 7 does not protect all concerted activities.[24] Significantly the Board itself previously recognized that there are limitations on Section 7 rights where distributions of literature on an employer's premises are concerned. In its decision herein[25] the Board reaffirmed its decision in *McDonnell Douglas Corporation*,[26] wherein it held that:

> "... any case which concerns an employer's restraint of employees' efforts to distribute literature upon their employer's plant premises, the first question we must answer is whether the distribution is pertinent to a matter which is encompassed by Section 7 of the Act."

The restrictions of Section 7 have been well articulated by several circuits. In *NLRB v. Bretz Fuel Co.*,[27] which involved the protest of a legislative proposal by miners, the Fourth Circuit found the activity to be outside the ambit of Section 7 protection. There employees opposing proposed "Fire Boss" legislation (which would permit company foremen to perform inspections rather than the designated safety inspector) engaged in a work stoppage and picketing. That court, in finding the activity unprotected, established the following standard:

> "... concerted activity is protected only where such activity is *intimately connected with the employee's immediate employment.*" 210 F. 2d at 396. (Emphasis added).

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[24] *NLRB v. Washington Aluminum Company, 370 U.S. 9 (1962); NLRB v. Leslie Metal Arts Company*, 509 F.2d 811 (6th Cir. 1975); and *Joanna Cotton Mills Co. v. NLRB*, 176 F.2d 749 (4th Cir. 1949).

[25] 214 NLRB at 274.

[26] 210 NLRB 280 (1974).

[27] 210 F.2d 392 (4th Cir. 1954).

That court's standard of "intimately connected" is substantially different and more appropriate than the Fifth Circuit's "reasonably related" guideline and more rationally consistent with the purposes of the Act.

The Ninth Circuit, in *Shelly & Anderson Furniture Mfg. Co. v. NLRB,*[28] expanded its concept of the required employer-employee relationship established in its earlier decision in *Bretz Fuel, supra.* That court, finding that a protest over dilatory bargaining tactics was protected activity, listed the four elements it deemed necessary as the predicate for such finding:

> "(1) there must be a work-related complaint or grievance;
>
> (2) the concerted activity must further some group interest;
>
> (3) a specific remedy or result must be sought through such activity;
>
> (4) the activity should not be unlawful or otherwise improper." 497 F.2d at 1202-1203.

Obviously, the union's publication here would not meet this test.

The Sixth Circuit discussed the scope of Section 7 protection in *Leslie Metal Arts, supra.* There the court found that three suspended employees had engaged in protected activity when they protested the company's failure to maintain discipline which resulted in a hazard to employee safety. In examining the issue, the court found that the protected activity

[28] 497 F.2d 1200 (9th Cir. 1974).

must in some fashion directly involve employees' relations with *their* employer. This requirement of a *specific* employer-employee relationship was clearly emphasized in the court's finding that:

> "When employee activity is directed at circumstances other than conditions of employment, it is outside the protection of Section 7." 509 F.2d at 813.

Clearly, the distribution of political or polemical material is "directed at circumstances other than conditions of employment." The Sixth Circuit, continuing to discuss the scope of Section 7, cited *G. & W. Electric Speciality Company v. NLRB*[29] to demonstrate how broad the spectrum of concerted activities might be, and pointed to that court's conclusion that the potential area of concerted activity was much broader than the coverage of Section 7:

> "The range of possible employee mutual interests apart from those which bear a reasonably significant impact upon working conditions or some material incident of the employment relationship is in our opinion *a much broader field than Section 7 is designed to encompass.*" 360 F.2d at 877. (Emphasis added).

In *G & W Electric,* the Seventh Circuit condemned the Board's attempt to expand the coverage of Section 7 to include "indirectly-related" concerted activity which bears a "reasonable connection" to interests of employees. There the Board had found that an employee's activity against an employee credit union was "within the general reach of the 'mutual aid and

[29] 360 F.2d 873 (7th Cir. 1966).

protection' clause." The court rejected this attempted expansion stating:

> "The sweep of the broad interpretation inherent in the Board's application of the 'or other mutual aid or protection' clause to the facts of the instant case gives to that clause a meaning and effect which in our opinion is out of harmony with the immediate context in which the clause appears and which *transcends the subject matter the Act is designed to embrace — labor management relations.*" 360 F.2d at 876-877. (Emphasis added).

The court further noted that the employees involved in the dispute had status as borrowers or depositors-investors, not status as *company employees.* It was because of this status that the court found that the activity had no "significant connection to their employment relationship with the company."[30] By analogy, it is submitted that any employees of Eastex who might have had an interest in distributing the political literature for the union had the status of interested citizens or agents of the union, but *not* as employees of Eastex, and were, therefore, outside the protection of Section 7.

As indicated, the court below recognized that the issue presented here is novel. Extensive research confirms its statement. No cases have been found wherein this Court, any other court, or the Board at any earlier time has found — or even suggested — that unions, their members, non-union employees and others who may act with them, have the right under Section 7 to distribute on an employer's private property political or other polemical materials, which do not involve matters directly or

[30] 360 F.2d at 876.

immediately within the "employer *vis-a-vis* his employees"[31] relationship.

This Court succinctly summarized the limited nature of communication rights in its decision in *NLRB v. United States Steelworkers of America.*[32]

> "The Taft-Hartley Act does not command that labor organizations as a matter of abstract law, under all circumstances, be protected in the use of *every* possible means of reaching the minds of individual workers...." (Emphasis added.)

In reaching its conclusions herein, the Fifth Circuit relied on authority easily distinguishable from the instant case. The primary decision it relied on was *Fort Wayne Corrugated Paper Co. v. NLRB,*[33] which involved the discharge of an employee allegedly because of his organizational activities involving another employer. The private property rights of neither employer were involved. The court there concluded that an employer could not discharge an employee for union organizational activity even when the activity involved another employer. Significantly the Seventh Circuit's decision was rendered in the context of organizational activity, an obvious Section 7 core right which had absolutely no involvement with private property rights. Subsequently, the Seventh Circuit, in *G & W Electric,* set forth its "employer control" rule discussed *supra,* which accurately depicts that court's view of the "employer *vis-a-vis* his employees" test.

[31] This court has often referred to this phrase as the "touchstone of labor relations." *National Woodwork Manufacturers Assn. v. NLRB,* 386 U.S. 612, 645, (1967); *Cf. Columbia River Packers Assn. v. Hinton,* 315 U.S. 143 (1942).

[32] 357 U.S. 357, 364 (1958).

[33] 111 F.2d 869 (7th Cir. 1940).

Thus, the broad view the court below attributes to the Seventh Circuit is errant.

The court below also cited other cases it considered in accord with *Fort Wayne Corrugated,* dealing with such issues as a refusal to bargain,[34] a discharge related to the newspaper publication of a strike resolution,[35] and the right to have a union representative present during an investigative interview.[36] However, the highly significant and distinguishing feature of each of these cases is that like *Fort Wayne Corrugated,* none of these cases involved the private property rights of the employer. The rights of the employees to engage in politically oriented activities *off* the employer's premises is not the issue in this case, but this is, at most, the only proposition for which the court below cited supporting case law.

D. Should the Court Find that the Distribution of Materials in Issue Fall Within the Scope of Section 7, the Conflict of Rights Should Be Resolved in Favor of Eastex's Private Property Rights Because of Constitutional Considerations.

Here the alleged right to invade the employer's private property can at best be argued to be only incidental to Section 7 within the "penumbra" of employees' Section 7 rights. Even if this Court should conclude that Section 7 encompasses such right, it does

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[34] *Bethlehem Shipbuilding Corp. v. NLRB,* 114 F.2d 930 (1st Cir. 1940), which cited *Fort Wayne Corrugated* on that issue only.

[35] *Peter Cailler Kohler Swiss Chocolates Co. v. NLRB,* 130 F.2d 503 (2d Cir. 1942).

[36] *NLRB v. Weingarten, Inc.,* 420 U.S. 251 (1975).

not necessarily follow that unions, their members, and non-union employees, and others acting in concert with them can force an employer to yield his private property for such purposes.

The circumstances of this case make it clear that if any such peripheral Section 7 right exists, it necessarily must give way to the more pervasive constitutional right of due process — one's basic right not to cede his private property against his will for use by others. To rule otherwise would result, as discussed *supra,* in the complete entanglement of private property rights in the honeycombs of political activities of virtually unlimited varieties. Private property rights are a basic tenet of our Constitution. The founding fathers sought to zealously guard private property rights, and this Court, in an endless string of decisions, has steadfastly preserved those rights.

Indeed, this Court's teaching in *Hudgens, supra,* is informative. The issue there was the right of employees to picket their employer in a privately owned, enclosed shopping mall. In discussing the accommodation of Section 7 rights and private property rights, the Court stated:

> "What is a *proper* accommodation in any situation may largely depend upon the *content* and *context* of Section 7 rights being asserted." 424 U.S. at 521 (Emphasis added).

In *Hudgens,* the Court noted the "conspicuous contrast" between the task of the Board and courts in accommodating these rights and the duty of a court to apply First Amendment standards. As the Court pointed out, the guidelines for performing this task were enunciated in *Babcock & Wilcox Co., supra,* and later

echoed in *Central Hardware, supra,* where the Court stated that the accommodation of these conflicting rights:

> "... must be obtained with as little destruction of one as is consistent with the maintenance of the other." 351 U.S. at 112.

The Court recognized that the location of the accommodation:

> "... may fall at different points along the spectrum depending on the *nature* and *strength* of the respective Section 7 rights and private property rights asserted in any given context." 424 U.S. at 422. (Emphasis added).

Here the Section 7 right essentially would protect political expression. Other courts dealing with political matters have concluded that a right of a political nature is subordinate to private property rights. In *Lloyd Corporation, supra,* this Court found that allowing handbilling of a political nature (draft and Vietnam War protests) would be "an unwarranted infringement of property rights."[37] The Court found that the private mall had not been dedicated to public use so as to entitle the exercise of First Amendment rights. Here there is no suggestion that Eastex has been dedicated to public use.

As discussed above, in *Bretz Fuel, supra,* the Fourth Circuit evaluated the "nature" of employee picketing over proposed legislation and found that where the acts of employees are considered to be political activity, there is no protection afforded by the Act.[38] In illustrating this principle, that court referred to

[37] 407 U.S. at 567.

[38] 210 F.2d at 397.

two other circuit court decisions[39] which involved a dispute over wages due under the Fair Labor Standards Act (29 U.S.C.A. § 201, *et seq.),* where employee activity was found to be protected. By analogy, the court stated:

> "But we think it equally clear that if these same employees had gone on strike to put pressure on Congress to pass a favorable change in the Fair Labor Standards Act, that would be *political activity and not protected by the Act,* which was designed to protect employees' rights more *intimately connected with their immediate employment."* 210 F.2d at 397 (Emphasis added).

The facts there are strikingly similar to the facts here. The purpose of the union's publication in Eastex was primarily to protest the right-to-work law, the presidential veto of the minimum wage law and profiteering in the oil industry. This, of course, is unmistakably political activity, and thus would be unprotected under this ruling by the Fourth Circuit.

If the Court concludes that such distribution is possibly within the realm of Section 7 rights, then it is suggested that the Court develop standards to govern the possible exercise of such right. Accordingly, it is suggested that the Court consider standards which would require (a) a direct employer *vis-a-vis* his employees relationship; (b) the four elements detailed by the Ninth Circuit in *Shelly & Anderson, supra,* (a work-related complaint, a group interest of the employees furthered by their concerted activity, a specific remedy

[39] *NLRB v. Moss Planing Mill Co.,* 206 F.2d 557 (4th Cir. 1953); and *Salt River Valley Water Users' Ass'n v. NLRB,* 206 F.2d 325 (9th Cir. 1953).

sought and activity which is not unlawful or otherwise improper); (c) the ability of the employer to control or effectuate change in the subject matter; and (d) consideration of whether alternate means of effective communication exist. The adoption of standards by the Court would be of enormous help in future cases, and would undoubtedly reduce, to some extent, the flood of cases that would otherwise result.

Amicus submits that the conflict here — between constitutionally required protection of the private property rights and the arguably remote Section 7 rights alleged — should be resolved in favor of the former as a matter of law.

III.

CONCLUSION

For the foregoing reasons, the decision of the court below should be reversed.

Respectfully submitted,

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